(22,414.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 444.

GEORGE A. FULLER COMPANY, PLAINTIFF IN ERROR,

vs.

WILSON A. McCLOSKEY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

No. 2153.

GEORGE A. FULLER COMPANY, Appellant,
vs.
WILSON A. McCLOSKEY.

a Supreme Court of the District of Columbia.

At Law. No. 50782.

WILSON A. McCLOSKEY, Plaintiff,
vs.
GEORGE A. FULLER COMPANY and OTIS ELEVATOR COMPANY, Corporations, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Declaration and Notice to Plead.*

Filed Jul. 18, 1908.

In the Supreme Court of the District of Columbia.

Law. No. 50782.

WILSON A. McCLOSKEY, Plaintiff,
vs.
GEORGE A. FULLER COMPANY and OTIS ELEVATOR COMPANY, Corporations, Defendants.

The plaintiff, Wilson A. McCloskey, sues the defendants the George A. Fuller Company, a corporation, and the Otis Elevator Company, a corporation, for that heretofore, to wit, on the 9th day of August, 1907, and for some time prior thereto, the said defendant, the George A. Fuller Company, was engaged in the building,

erection and completion of a certain building in the city of Washington, District of Columbia, known as premises No. 723 15th Street, N. W. wherein was located an elevator shaft or an enclosed open space, extending from the bottom floor of said building to the upper story thereof, and in said elevator shaft was a certain elevator, which said elevator had as its motive power electricity and was moved up and down the elevator shaft or enclosed space from the bottom of said building to the top thereof, said elevator shaft containing openings at each floor for passengers to get on and off; that in order to balance said elevator large weights are provided, which are attached to said elevator by means of steel cables, which said
2 weights move along and near to the side of said elevator between the said elevator and the wall enclosing said open space known as the elevator shaft, so that as the elevator moves up, the weights move down and vica versa as the elevator comes down, and so that at the fifth story of said building which is ten stories in height the elevator and weights meet, and the plaintiff says that the said George A. Fuller Company then and there employed a certain other company known as, to wit, Robert E. Mackay Company to paint the said elevator shaft in its various parts, and that said Robert E. Mackay Company entered upon such work and the plaintiff says that he was then and there in the employ of the said Robert E. Mackay Company and was by them directed to do the manual work of the painting of said shaft, as aforesaid, and that he then and there, to wit, on the day and year aforesaid was engaged in such work; that in order that the said Robert E. Mackay Company, its agents and employees might more conveniently and expeditiously paint the said elevator shaft as aforesaid, the said George A. Fuller Company entered into an agreement with said Robert E. Mackay Company for hire, to operate said elevator, so that said company's employees might stand on top of the elevator and that it might be lowered or raised as was necessary in the painting of said shaft and to start and stop said elevator whenever and wherever requested by this plaintiff, so that he might continue to paint or to alight from said elevator; that in pursuance of said contract for use of said elevator, the defendant the George A. Fuller Company, employed the Otis Elevator Company to run and operate the said elevator, to start and
3 stop the same at such times and at such places during the time that said elevator shaft was being painted as this plaintiff or any other employee of said Robert E. Mackay Company, who might be engaged in the painting of said shaft, might designate; that it then and there became and was the duty of it, the said George A. Fuller Company to so operate or cause to be operated said elevator, as the said plaintiff's employer of any of its employees engaged in said painting work might designate, and not to start the said elevator, or if started, not to carry said elevator farther than might be designated as aforesaid, and it then and there became the duty of the said defendant Otis Elevator Company, to execute the requests of the plaintiff's firm or any of its employees engaged in said work, among whom was the plaintiff, and especially not to start said elevator, or if started not to carry the same beyond the

point designated; that said plaintiff on the day aforesaid had finished his work, he then being on top of the said elevator, below the second floor, requested the said defendant Otis Elevator Company, its servants and employees to stop said elevator at the second floor, so that he might get off and alight therefrom; but the said defendants not regarding their said duties in the premises, did so negligently, carelessly and recklessly operate and caused to be operated said elevator, that the same was carried up to the fifth floor where the said weights and elevator meet, as aforesaid in direct violation of the request of the plaintiff; to stop the same at the second floor; that by reason of such carelesslessness, negligence and recklessness the plaintiff's right leg was caught between the elevator and the
4 iron weights aforesaid in such manner that one of the tendons was permanently severed at or about the ankle; that the bones of his right foot were fractured and his foot and leg were otherwise crushed and mangled; that by reason of such injury due to the carelessness, recklessness, and negligence of the defendants as aforesaid, he the plaintiff then and there became and was very sick, weak and distempered and remained so for a long time to wit, from said day to the present time and still suffers, and will continue to suffer great pain from said hurts; that he was, is and will continue to be deprived of the free use of the said leg by the said injuries; which said injuries are of a permanent character; that by reason of the hurts and injuries aforesaid, he has been prevented and will be permanently prevented from pursuing his trade, that of a painter, and is and will be permanently disabled and prevented from pursuing any occupation requiring manual labor; and the plaintiff was also put to great expense, to wit, in the sum of $500 in the attempted cure of his said hurts and injuries, all to the damage of the plaintiff in the sum of $10,000, wherefore he brings this suit and the plaintiff claims of the defendants the sum of $10,000, besides cost of suit.

S. V. HAYDEN,
Attorney for Plaintiff.

The defendants are to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of the service hereof; otherwise judgment.

S. V. HAYDEN,
Attorney for Plaintiff.

5 *Separate Plea of the Otis Elevator Company.*

Filed Jul. 28, 1908.

* * * * * * *

Now comes the defendant, the Otis Elevator Company, and for a separate plea to the declaration of the plaintiff filed in the above entitled cause says that it is not guilty as therein alleged.

McKENNEY & FLANNERY,
Attorneys for the Defendant
the Otis Elevator Company.

Plea of Defendant George A. Fuller Co.

Filed Aug. 11, 1908.

* * * * * * *

Now comes the defendant George A. Fuller Company and for a plea to the declaration in the above entitled cause, says that it is not guilty in manner and form as in the said declaration alleged.

EDW. S. DUVALL, JR.,
Attorney for Defendant, the George A. Fuller Company.

6 *Joinder in Issue Upon Plea of Otis Elevator Company.*

Filed Aug. 11, 1908.

* * * * * * *

The plaintiff joins issue on the plea of the defendant, the Otis Elevator Company.

S. V. HAYDEN,
Attorney for Plaintiff.

Joinder in Issue to Plea of Defendant George A. Fuller Company.

Filed Aug. 24, 1908.

* * * * * * *

The plaintiff joins issue on the plea of the defendant, the George A. Fuller Company.

S. V. HAYDEN,
Attorney for Plaintiff.

Supreme Court of the District of Columbia.

FRIDAY, *November* 20, 1908.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

7 Upon consideration of plaintiff's motion filed herein he is hereby granted leave to forthwith amend the writ and his pleadings herein, viz: 1. By striking out the name "Willien" where the same appears therein and inserting the name "Wilson" in lieu thereof.

2. In the twentieth line of the third folio of plaintiff's declaration, after the word "plaintiff" strike out the word "left" and insert in lieu thereof the word "right," and after the word "his" in the twenty-third line of the same folio strike out the word "left" and insert the word "right."

And it is further ordered that the pleadings of the defendants be allowed to stand as though filed to the plaintiff's declaration as amended.

Memoranda.

October 13, 1909.—Verdict for Defendant, Otis Elevator Company.

October 19, 1909.—Verdict for Plaintiff for $5425. against George A. Fuller Co.

Supreme Court of the District of Columbia.

WEDNESDAY, *October 20th*, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

8 It appearing that under the Rule of Court, judgment on verdict should be entered herein in favor of the Otis Elevator Company, one of the defendants, it is so ordered. Wherefore, it is considered that the plaintiff herein take nothing against said defendant Otis Elevator Company, that said defendant go hereof without day, be for nothing held, and recover of plaintiff its costs of defense to be taxed by the clerk, and have execution thereof.

FRIDAY, *October* 29, 1909.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

Now comes on for hearing defendant's motion for a new trial herein, upon consideration whereof, it is ordered that said motion be, and the same is hereby overruled and judgment on verdict is ordered. Wherefore, it is considered that the plaintiff herein recover of defendant herein, the sum of Five Thousand Four Hundred and Twenty-Five Dollars, for his damages as aforesaid assessed, with interest from this date, together with costs of suit to be taxed by the clerk, and have execution thereof.

From the aforegoing, the defendant by its attorneys, in open court, notes an appeal to the Court of Appeals of the District of Columbia.

Thereupon, upon motion of defendant the penalty of a bond to operate as a supersedeas, is hereby fixed in the sum of Eight Thousand Dollars.

9 *Memoranda.*

November 1, 1909.—Appeal bond approved and filed.
December 13, 1909.—Bill of Exceptions submitted and time to file record in Court of Appeals extended from time to time to and including March 15, 1910.

Supreme Court of the District of Columbia.

THURSDAY, *February* 24, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice, presiding.

* * * * * * *

The Court having this day signed the Bill of Exceptions taken at the trial of this cause and heretofore submitted herein now orders the same of record nunc pro tunc.

Bill of Exceptions.

Filed Feb. 24, 1910.

* * * * * * *

Be it remembered, that at the trial of this cause before the Honorable Chief Justice Clabaugh of the Supreme Court in and for the District of Columbia, and a jury regularly empanneled and sworn to try the issues pending between the plaintiff and the defendants, counsel for the plaintiff, to maintain the issues on his part joined, produced as a witness HELGE O. H. MURRAY, who, having been first duly sworn, testified that he was a draftsman and that he made a drawing of the east elevator in the Hibbs Building at 723 15th Street Northwest in this City. That said drawing is hereto annexed. That the top of the elevator, from measurements
10 made by him, was twelve inches in height and dome shaped; that the extreme measurement of the elevator was four feet eleven and one-half inches in width and depth with a flat surface or rim six and one-half inches in width, on top of the elevator and lying between the dome and the four edges of the top; at the top of the elevator and secured thereto were two sets of cross beams, one set arranged diagonally of the other and intersecting at the center of the top of the car; that the width of one set of cross-beams was ten and one-half inches and the width of the other set two inches and that from the top of the beams to the rim or flat surface of the roof of the elevator was thirty-three inches while it was twenty-seven inches from the said flat surface to the bottom of the beams; that the counterweight of the elevator was twenty-eight inches in width and operated with one inch of clearance between it and the rim or flat surface aforesaid, the said counterweight being located on the east side of the car; that to the south of the counterweight there

was a space of seventeen inches on the aforesaid flat surface or rim measuring to the front edge of the top of the car; that the dome was of sheet metal and that the entrance to the car, viewing the top in plan, was in the south side.

Upon cross examination, by counsel for the defendant the George A. Fuller Company, the witness testified that the elevator tracks were located in opposite corners of the shaft, one set of tracks being at the back thereof and on the same side with the counterweights while the other set was located at the front of the shaft, both sets being in line with the wider set of cross-beams.

Upon cross examination by counsel for defendant, the Otis Elevator Company, the witness also testified that the elevator top was all closed and that on top of the dome there was a surface two
11 feet square.

Upon further cross examination, by counsel for defendant, the George A. Fuller Company, the witness testified that the aforesaid cross-bars were fixed to the car by being supported on the top thereof and to one set of said cross-bars were connected the shoes that slide upon the elevator tracks; and the distance on the aforesaid rim from the front of the car to the weights measured seventeen inches.

The examination of said witness being concluded, WILSON A. MCCLOSKEY, plaintiff, was produced as a witness in his own behalf and testified as follows:

That he is the plaintiff in this case. In the month of May, 1909, he examined the elevator that has just been described in the Hibbs Building. It is in the same condition now that it was on August 9, 1907; that he is a painter thirty-six years old employed on August 9, 1907, at the Hibbs Building, 723 15th Street; that he was painting the elevator shaft. They were painting the east shaft. They commenced on the tenth floor and worked down. They had finished their work as far as they could, down to the bottom floor without working under the elevator. He asked Joe (meaning Mr. Locke) to take them up to the second floor and to leave them off there so they could get under the elevator and go down to the bottom floor. Locke started the car and when he got to the second floor he made a pause as though he were going to stop the car and all at once he started again and before witness could regain himself he was fast in the weights. He was standing right where he had finished on the east side of the elevator between the weight and the
12 opening that is the front door. Witness then indicated this point on the drawing. He was standing with one foot behind the other on the six inch ledge or rim. The elevator paused at the second floor and then the operator ran him into the weights on the fifth floor. When they got to the second floor and made no effort to stop, witness changed the brush under his arm and went to make an effort to open the door. He had stopped the car, you might say, had sort of come to a pause and all of a sudden he started the car up. That threw witness off his balance and before he could regain himself he was in the weights—caught between the weights and the top of the car. He was held in that position just about five minutes. Mr. Renner, the man who was working with him

on the car, helped to extricate him. Witness had a paint box and stippling brush in his hands. The leaders were completely cut off the back of his leg and his heel was smashed. The bones were broken. He was taken to the Emergency Hospital and was there about six weeks or may be eight weeks. He then went home and remained at home two weeks and then went to the Providence Hospital for a skin grafting operation. He remained at that hospital eight weeks and then went home and kept going to the dispensary of the Providence Hospital for treatment. Later on, on the 6th day of June, he went to the Garfield Hospital and was there four weeks, in the year 1908. Since then he went to the Garfield Hospital last winter and was there about eight weeks. The tendon was severed and the bones of the heel were broken. The effect is that he is not able to do any work and not able to be on his feet much.
13 He has an iron shoe or an iron sole to enable him to get around at all. At this point the witness exhibited his injured foot to the jury. He has not much use of his foot now. It swells up and pains him when he is on his foot for any length of time. At this time the wound is open and discharging. Since receiving the injury he has not done any manual labor and has not been able to. He tried but could not do it. He is now a night watchman at the Central Union Mission, getting two dollars a week, but got only one dollar at first. His wages as a painter were twenty-one dollars a week. He is also a paper hanger. He spent about $175 on account of his injuries. When he went to the hospital he was there in the free ward, except at Providence Hospital. While there he paid one dollar per day. At the Emergency, Dr. White was Superintendent. At the time of the accident he was working for the Mackay Company of New York. A man named Locke was running the elevator. Witness knew him. The Mackay Company was doing the painting in the Hibbs Building. A couple of men were in the elevator at the time. He does not know who they were. Witness did not exercise any control over the operator. He had nothing to do except to inform the operator where he wanted to go and where he wanted the operator to take him. That is all he had to do with the operating. He told the operator that he wanted to stop at the second floor. He told the operator to take them up to the second floor and leave them off; that they wanted to get underneath the elevator. They were on top of the car and wanted the operator to take them to the second floor and get off so as to
14 ride down to the bank floor and get out and get under the elevator to go to work. Mr. Renner stood on the south side of the car next to the door.

Upon cross examination by counsel for the defendant, the Otis Elevator Company, the witness testified as follows:

Q. How long had you been working on the elevator shaft? A. That morning, you mean?

Q. No; I mean altogether. A. I don't remember; I worked at different times.

Q. Can you not tell us whether you had been working there covering a period of a week or two weeks or three weeks? A. You see

it was a day and then half a day and back and forth so on, and I could not recall exactly.

Q. This accident happened on what day? A. On the 9th of August, 1907.

Q. And when did you go to the Hibbs Building and begin to paint the elevator shaft? A. I could not tell that.

Q. You had been at work about the shaft for about three weeks, had you not? A. I worked there at different times.

Q. And you were using the elevator-car in painting the shaft, were you not? A. Yes, sir.

Q. As a sort of travelling stage, going up and down? A. Yes, sir.

Q. How many painters worked with you on the shaft? A. Sometimes there were four of us. No, there were only two of us on the inside, only two on the inside.

15 Q. Who was the boss of the men who were working on the inside? Q. Who was the boss of the painters? Robert Minte.

Q. What is his position with the McKay Company? A. He was foreman.

Q. Was he inside the shaft working on the car with you? A. No sir.

Q. Who was in charge of the men while they were working on the shaft? A. Well, I most generally was; I was in charge that day. That is, I directed them.

Q. Yes, you directed them that day. Minte would tell you what to do and then you would tell the men? A. No, he didn't tell me; he simply told us to go in there and paint the elevator and touch up the spots, and of course one or the other of us had to give the commands or instructions.

Q. So that day you were giving the instructions or commands? A. Yes, sir.

Q. And you were the one who told the elevator operator how to move the car up or down as you wanted it moved. Mr. Renner didn't do that, but you did it that day, did you not? A. I asked him that time. I don't know whether Renner asked him or not.

Q. Renner was working with you? A. Yes sir.

Q. Had you finished all your painting on the shaft that morning? A. No, sir.

Q. The roof of the elevator was a closed roof, was it not?

16 A. It was a sheet iron top, I believe.

Q. And there was no way of your being seen by the elevator operator from the inside of the car, was there? A. No, sir.

Q. To communicate with the elevator operator you would have to call to him, would you not, in a loud voice? A. Speak in a loud voice? It was very easily heard. It was open all around the car.

Q. That is, it is open on one side, is it not? A. Well, it is open on the front. I din't know about the sides, whether there is lattice work on the sides or not; I don't recall that.

Q. Is it not a fact that there are two cars running up in twin-shafts? A. Yes sir.

Q. With an open-lattice work around the doors and simply an

opening between the two cars, and the balance is brick work masonry? A. Yes sir. There are cross-beams along between the cars.

Q. How long had this elevator operator been operating the car; had he been there all the time, all the three weeks that you were employed on the shaft? A. I think so.

Q. You knew him pretty well, didn't you? A. Yes sir.

Q. You knew him well enough to call him by his first
17 name? A. Joe; yes.

Q. And he called you by your first name? A. I don't know what he called me. I guess he called me Mac.

Q. Was anybody present when you told Locke, the elevator operator—— A. Mr. Renner was right by me.

Q. Were you inside the car; I mean were you on top of the car then, or outside the shaft? A. On top of the car.

Q. Where were you on the first floor? A. On top of the car at the first floor.

Q. And you wanted to get off at the second floor? A. Yes, sir.

Q. And the roof of the car was pretty close to the second floor, was it not? A. It was perhaps ten feet; I could not say. May be it was ten feet, but that would be a guess.

Q. Did Locke hear what you said? A. He must have; he started the car.

Q. Did he make any response to you? A. I could not say; I don't recall.

Q. Did you make any effort to find out whether Locke understood you wanted to get off at the second floor? A. No; I didn't make any effort because I would tell him in a distinct, loud voice, where I wanted to go, and he would take us there.

Q. So you called to him that you wanted to get off at the second floor, and when you started you assumed that he heard what
18 you told him? A. Yes, sir.

Q. But you cannot say positively that Locke did hear you? A. I don't know what he started the car for if he didn't hear me.

Q. If you had not given instructions at all, and somebody was getting on—— A. He was not supposed to carry passengers when we were working there.

Q. And he was not supposed to operate the car without receiving a direction from you, was he? A. I don't think so, not when we were in danger up there all the time.

Q. He was only to take the car up and down when you told him to do it, was he not? A. Yes sir.

Q. And on this occasion you told him you wanted to get off at the second floor? A. Yes sir.

Q. That would require the moving of the car how many feet? A. I suppose ten or twelve feet. I could not say, but it would be along there somewhere.

Q. Was Mr. Renner standing on the rim of the car, or standing on the flat surface on top of that dome? A. He was on the rim.

Q. How big was that flat surface on the dome of the car? A. Up on top?

19 Q. Yes. A. I don't know; but I don't think it is over three feet.

Q. Three feet square? A. Yes; I don't know whether it is that much.

Q. That was about twelve inches above the rim where you were standing? A. I believe it is twelve or fourteen inches or something like that.

Q. And this rim was only about six and a half inches wide? A. Yes sir.

Q. That is, there was a distance of about six and one-half inches between the side where the weights ran up and down and the rounded part of the dome? A. How is that?

Q. This ledge was about six inches from the side where the weights went up and down to the rounded part of the dome was it not? A. Six and a half inches, I believe.

Q. What were you doing while standing there? A. I just finished my work where I stood, and as I only had a few feet to go I asked him to carry us up there.

Q. In working on top of the car in that shaft off and on during three weeks you had seen where the weights hung and where they passed, had you not? A. Yes sir.

Q. And you knew they passed about the fifth floor somewhere, did you not? A. Yes sir.

20 Q. That is, the weights of the car, ascending and descending would meet about the fifth floor? That is, the weights passed about the fifth floor? A. Yes sir; the fifth floor.

Q. On which side of the shaft were the weights? A. They were on the east side.

Q. That was the side you were standing on? A. That was the side I was standing on.

Q. Did you not regard that as a rather dangerous place to stand, the east side of the car where the weights were? A. Not where I was standing; I was standing with my feet in, in the clear.

Q. Were you talking to Renner? A. I don't know that I was, not then.

Q. Had Locke, at any time during those three weeks, ever refused to start the car and stop the car and run it when you wanted to go up and down? A. No; I don't think so; I don't know whether he had or not.

The COURT: I did not catch that.

Mr. FLANNERY: I asked him whether Locke had ever refused to start the car or stop it when he asked him to, in obedience to his directions, and he says he thinks not.

By Mr. FLANNERY:

Q. Well, if he had done so, you would remember it, would you not? A. Sir?

Q. If he had refused to take you up or bring you down you would remember it, would you not? A. I think so. I don't remember it.

21 And to the best of your recollection he did not do it? A. Not to my knowledge.

Q. What sort of an elevator was it? A. It was an Otis Elevator? Is that what you mean; the make of the elevator?

Q. No; I mean was it an electric elevator or what is called a hydraulic elevator? A. It was an electric, I think; I am not certain that it was an electric elevator.

Q. While you men were working around there the elevator was operated at a very low rate of speed, was it not? A. I think it ran just about the same as it does now. It runs pretty fast.

Q. If it was running the same as it does now, how could you paint the shaft from the dome to the elevator? A. How could we?

Q. Yes. A. Why, the elevator was standing still when we were working.

Q. But when you were touching up this elevator shaft, a spot here and a spot there, it was running very slowly, was it not? A. He would raise me up or drop it down a couple of feet, wherever we wanted — go, and then we would stop just at the spot we wanted to be.

Upon cross examintion by counsel for the defendant the George A. Fuller Company, witness testified as followz:

Q. How long were you working inside the elevator shaft
22 the day of the accident? A. The morning of the accident?

Q. Yes. A. I don't remember, but I think about nine o'clock or half-past nine.

Q. What time did you go to work? A. Half-past seven.

Q. What work did you do before you went to work in the elevator shaft? A. I don't understand your question.

Q. You say that you started to paint the elevator about nine o'clock. A. No; about half-past seven.

Q. I misunderstood you, then. What time did this accident occur? A. It was about nine or half-past nine; I could not tell exactly.

Q. How many coats did you put on that elevator shaft or on the wall? A. Well, I helped put on different coats. I don't know how many were put on.

Q. How long were you engaged in helping to put on different coats? A. I could not recall that. I worked there from time to time.

Q. Was it two or three days or a week? A. I expect it was perhaps a week.

Q. Was it more than a week? A. I could not say.
23 Q. Could it have been more than a week? A. I could not say.

Q. After you put on the different coats, you said you did some touching up. What did that consist of? A. The spots on the wall where plaster had been broken out and plastered up.

Q. And that required you to direct the elevator operator to go up and down very slowly, did it not? A. I didn't ask him to carry me very slowly.

The COURT: You are going over the same thing.

Mr. DUVALL: This is more particularly as to the work he did that particular day. But will change that line of examination.

Q. At any time that you were working on that elevator, did you have it held in one position for any length of time? A. It would be held there until we got through painting.

Q. Now, on this day, when this accident occurred, you say you dropped from the tenth floor to the first floor touching up spots, and then at the first floor you say you wanted to go to the second floor to get off. A. Yes, sir.

Q. And you say that there was a pause at the second floor and you reached to open the door; is that correct? A. I don't know that I reached. I placed the brush under my arm. I had a paint box and a paint brush under my arm, a stippling brush; and I made an effort to get ready to open the door, but I don't think I reached.

Q. What did the effort consist of? A. Changing the brush under my arm.

24 Q. And the elevator was still in motion? A. It was just about to stop, and I made the change and it started again.

Q. It was still moving? A. It stopped and started.

Q. What length of time did that consume, that stopping and starting again? A. I could not tell you.

Q. Whom did Lock work for, do you know? A. He was working for the Fuller Construction people, I understood.

Q. You understood that? A. Yes sir.

Q. Do you know whom he was working for? A. I am pretty sure of it. He told me so.

Q. How do you know that? A. He told me he was.

Q. Locke told you he was? A. He said he was paid by the Fuller people.

Q. When did he tell you that? A. He told me that in the presence of Mr. Hayden.

Q. When was that? Will you tell me when this was that you had that conversation? A. I cannot recall, but it was down to the Munsey Building.

Q. Was anyone else present besides Mr. Hayden and yourself? A. No; and Mr. Locke.

Q. Where did your painters keep your materials while

25 you were working there? A. We had been keeping them on the fifth floor, but the shop had been moved to the other building.

Q. Did you have any materials stored in this building on the day of the accident? A. No sir.

Q. You say that the elevator went beyond the second floor. What effort, if any, did you make to have the elevator stopped? A. What effort did I make?

Q. Yes. A. Nothing more than to ask him to leave me off at the second floor.

Q. I mean when you found that the elevator was going beyond your destination, what effort did you make to have him stop it? A. I didn't pretend to make any effort. He started with a jerk and threw me out of balance, and before I could get up I was fast in the weights.

Q. You mean you had no time between passing the second floor

and the fifth floor to do anything to stop the elevator? A. That is a short distance from the second floor to the fifth floor.

Q. You made no outcry whatever when you lost your balance? A. It confused me and I didn't have any chance to make any outcry.

26 Q. Did Renner say anything? A. Renner didn't know what to think about it. I don't think he did.

Q. You know where the tracks are that that car ran on? A. I know where they are, but I don't know whether I can locate them.

Q. Who painted those tracks on the outside? A. Well, I think I helped to do it, although I could not say.

Q. And you knew that elevator weights were located very close to those tracks? A. Yes sir.

Q. And you knew that they passed the car between the fourth and fifth floors? A. Yes sir.

Q. Near the fifth floor. Did you ever have occasion to use the cross-bars over the top of that car while painting the shaft? A. Did I ever have occasion to use the cross-bars?

Q. Yes, for a place to stand. A. No; we never made use of them.

Q. You never used them? A. We sometimes would hug up in there.

Q. You never got on top of the cross-bars? A. No sir; I don't remember that.

Q. Why, on this occasion, did you not stand on the cross bars instead of standing on the ledge? A. No, sir; I stood on the ledge.

Q. Was not the cross-bar there a better place to stand or
27 sit? A. No, sir.

Q. Why not? A. It was 33 inches high, and it was narrow, and you would get up there and there would be no place to balance yourself.

Q. And you could not perch up on those cross-bars and catch hold of the cable and be in a safe position? A. Well, I don't know. I suppose I could have got in——

Q. No; I don't mean to get in. I mean to sit up on the cross-bars. A. No sir.

Q. It would be trouble to pull yourself up there, would it? A. It would be quite a load when you had your hands full of stuff.

Q. Where was your left foot, Mr. McCloskey? A. My left foot? That was as far as I could get it along towards the south corner of the car, like I was standing on the east side.

Q. Show just exactly the position that your right foot maintained towards the car; was it at right angles to the edge of the car? A. I stood like that (indicating), on the ledge.

Q. It was at right angles to the ledge of the car wasn't it; it was not on a slant? A. It was on a slant, yes; along on a six-inch piece. I was trying to get my foot over.

Q. I understand that, but was your foot straight across the ledge or was it on a slant with the ledge? A. Lengthwise.

28 Q. Lengthwise or crossways? A. It was lengthwise as much as I could twist my feet around to have it.

Q. Was your left foot on the south side of the elevator or the east

side? A. My foot was on the side of the doorway; just like that (indicating).

Q. Turn around to that second figure. I don't understand whether your left foot was on the left side there. You see the second figure there. A. My left foot was right here (indicating).

Q. Which way was the toe pointed? A. Towards the door.

Q. Which way was the toe of the right foot pointed? A. The same way.

Q. Towards the door? A. Yes sir.

Q. What were you holding on to? A. I was not holding to nothing; there wasn't nothing to hold to.

Q. Is it not a fact that Mr. Locke used to repeatedly warn you to look out for those weights while you were riding on top?

Mr. HAYDEN: Objected to.

A. Never; he never did.

The COURT: He says he never did.

By Mr. DUVALL:

Q. Were you not warned just before this car started up to look out for the weights? A. No sir. I always told the men
29 working there to look out for the weights and was careful myself.

Mr. DUVALL: I want to ask the witness to identify a signature on these cards. Do you want to look at them, Mr. Hayden? I think you have seen those.

Mr. HAYDEN: Yes; these are all right.

By Mr. DUVALL:

Q. Now, I will ask you to take these time cards and look them over and see if those cards contain your signature. Is that your signature on the first card (handing witness a card)? A. (After examination.) That is my signature.

Q. Look at the time on that and tell me if that is correct. The date of that card is June 17th, is it not? A. Yes sir; June 17th.

Q. How many hours of work that day? A. Eight hours. I could not recollect whether that is correct or not, but I expect it is.

Q. You were paid for eight hours that day? A. Yes sir.

Q. You worked eight hours on the 17th of June in the Hibbs Building? A. Yes sir.

Q. Is that correct? A. Yes sir.

Q. And you were paid for eight hours? A. Yes sir.
30 Q. Look at the next card. A. June 18th.

Q. Eight hours that day? A. Yes sir.

Q. Is that correct? A. I suppose it is.

Q. And you were paid for eight hours? A. I expect so.

Q. If you are in doubt about that, say so. A. I would not swear to it, but that is my signature.

Mr. HAYDEN: I think I may be able to shorten this proceeding.

I have entered into a stipulation to admit all these time-sheets in evidence, and that they are correct.

Mr. DUVALL: The reason I want him to identify these cards is that I want to ask him what work he was doing on these different dates.

By Mr. DUVALL:

Q. I will ask you if between the 17th of June—the 17th, 18th, 19th and 20th—up to the end of June, if you can state what work you were doing? A. I could not.

Q. You worked full time during the first, second, fifth, sixth, eighth, ninth, tenth and twenty-ninth of July, 1907. Can you state what work you were doing? A. The twenty-ninth?

Q. Except the twenty-ninth when you made four and a half hours. A. I could not recall now.

Q. You can not say you were doing any work there then
31 or not? A. I suppose I might have worked in there; I could not say whether I did or not.

Q. On the first of August there were eight hours that you put in. Could you tell what work you were doing on the first, second, third, sixth, and seventh of August? A. Is not that on the other building, the Union Trust Building?

Q. No; this is all the Hibbs Building. You put in eight hours on the first, four hours on the second, eight hours on the fifth of August, eight hours on the sixth of August, the seventh of August eight hours, the eighth of August eight hours. Those are the days previous to the accident? Now, can you tell us whether you were in that east shaft or the other shaft during those days? A. I cannot recall whether I worked in either one of them during those days.

Q. You would not say that you did not work in them? A. I would not say I did.

Q. But these three hours on the ninth of August—— A. Yes, I was hurt that morning and I was working there then.

Q. And you say that you were at the Garfield Hospital, Mr. McCloskey, for some weeks. Were you there for treatment all the time? A. Yes sir.

Q. You did no work while you were there? A. No sir.

Q. You started to say, in answer to a question put to you by your counsel, that after the elevator came down you directed the
32 operator, and then you were stopped, and on the next question you changed that to say, "I asked him?" A. Yes sir.

Q. Why did you make a change from "I directed him"? A. Well, I asked him; it is all I could do.

Q. No; I mean why did you change the form of your answer? A. For the simple reason that I could not tell him what to do. I was not his boss or anything like that.

Q. Then you did not like the form of your first answer? A. I don't know about that. Of course it was up to me to ask him.

Q. That is the best explanation you can give for the reason you changed your former answer? A. Yes sir.

The witness being recalled further testified that he did not think Minte was in the District of Columbia at this time; that he went to Providence Hospital for a skin grafting operation which was performed by Dr. Mitchell. Skin about three and one-half inches by seven inches was taken from his thigh for this. The purpose of wearing the brace on his leg and ankle was to keep his foot from running sideways and getting crooked.

On cross examination he testified that he thought he went to the Providence Hospital in the month of November; that at the time of the accident the first set of blocks ran by him. It was somewhere in there (indicating on the drawing) the first set of blocks ran by him.

33 Examination of said witness being concluded, NEWTON D. RENNER was produced as a witness in behalf of the plaintiff and testified that he was a painter and decorator employed by the Robert E. Mackay Company on August 9th, 1907, and on said date was painting in the said elevator shaft at the Hibbs Building, with the plaintiff, and touching up spots; that they had come down to the first floor and he was standing on top of the elevator, at the front thereof, facing the door and that McCloskey was standing at his left, in the place where said McCloskey stood when he, McCloskey finished work; that the top of the elevator was about ten feet below the second floor; that the plaintiff told Joseph Locke, the elevator operator, to take them to the second floor so they could get off and go underneath the car; that he did not hear Locke make any response; that Locke started the car shortly after; was about to stop at the second floor, just about paused, and then went on; that his back was to McCloskey and that he did not notice McCloskey's position after they started up; that he did not observe what effect the starting had on McCloskey; that they were taken above the fifth floor and then the car stopped suddenly; that he asked McCloskey what was the matter and McCloskey said his, McCloskey's foot was caught; and that was the first he knew what happened.

Upon cross examination by counsel for defendant, the George A. Fuller Company, the witness testified that he did not hear McCloskey make any commotion after the elevator passed the second
34 floor and that the pause of the elevator did not have any effect upon him, Renner; that he did not notice anything while the elevator was going up and in a few minutes McCloskey was caught and that was all he knew; that on the day of the accident he made a statement to Mr. Fisher, superintendent for the George A. Fuller Company, telling how the accident occurred and that on that occasion he did not remember but possibly he might have said that the car did not stop at the second floor and that he might have said that he and McCloskey stood just where they were and did not change their positions; that on the day of the accident and while he and McCloskey were on top of the elevator they rode up and down quite often; that on the trip which the car made when the accident occurred he was holding on to the wire cables from which the car was suspended, and that he and McCloskey did not stand on the

cross bars on top of the car because they had only a short distance to go and did not need to.

Thereupon the witness was asked the following:

Q. How many times did you pass the fifth floor? A. That I don't know.

Q. Was that often or not? A. Well, I don't know. I could not say how often it was.

Q. Was it more than once or twice? A. You see they were hauling passengers up and down there now and then.

Q. That is not in response to the question. I asked you
35 if you passed the fifth floor more than once? A. As well as I can remember we got on at the fifth floor and went on up to the top of the shaft and then came down, worked down to the bottom. But I think between that time we probably went up and down several times with passengers.

Mr. DUVALL: I ask that that part of the answer of the witness be stricken out.

The COURT: I think that is responsive.

Mr. DUVALL: I asked him how many times they passed, and he said something about passengers.

The COURT: I think he said he passed several times painting and several times carrying passengers. Is that what you said?

The WITNESS: Yes sir.

Mr. DUVALL: I did not so understand him.

Q. And you were on top all that time? A. Yes sir.

Q. And Mr. McCloskey was there, too? A. Yes; he was also there.

Q. Were you holding to anything when the elevator was going up the last time? A. Yes, I was holding to the wire ropes, the cable.

Q. That carries the car? A. Yes.

Q. What did Mr. McCloskey have hold of, if anything? A. I don't believe he had hold of anything; I don't know, though; I could not say.

36 Q. Is there any reason that you know of why you could not have stood on those cross-bars on the top of the carriage? A. We could not work from those.

Q. I mean when you were not working; could not a person stand there? A. We had a short distance to go and we did not need to; we would just go up a short distance.

On redirect examination the witness testified that if they had been going beyond the fifth floor they would have prepared themselves.

The examination of the said witness being concluded, RAMSEY W. SCOTT, was produced as a witness in behalf of the plaintiff, and testified that he was in the elevator business and was the local manager of the Otis Elevator Company; that he knew that the Otis Elevator Company, a defendant in this case, was furnishing a man by the name of Joseph Locke for the running of an elevator, at the Hibbs Building but he could not state under what arrangement the said

Locke was so furnished, as any such arrangement was verbal and very likely made between the foreman of the Otis Elevator Company, in charge of the work at the said Hibbs Building, and a representative of the George A. Fuller Company; that he did not make the arrangement himself; that the said Joseph Locke, was the person referred to by witnesses in this cause; that the Otis Elevator Company supplied the man to run the aforesaid elevator and care for the machine; that said man ran the car during the day and cleaned the machine in the evening to have it in readiness
37 for the next day; that this elevator operator was paid by the defendant, the Otis Elevator Company, and that the George A. Fuller Company was charged $3.00 a day, by the Otis Elevator Company, for the running of the car by this man and the bills were paid by the said Fuller Company; and that the defendant, the Otis Elevator Company, had not formally turned over the elevator to Mr. Hibbs the owner of the Building.

On cross-examination by counsel for the defendant, the George A. Fuller Company, the witness testified that the operator was Joseph Locke and that he was carried on the time books of the Otis Elevator Company, defendant herein, and that the Otis Elevator Company charged the George A. Fuller Company $3.00 a day and double pay for overtime, which was for the service in running the car or elevator, and looking after the machinery; that he knew that on or about the 5th of March 1907, the defendant, the George A. Fuller Company, requested the Otis Elevator Company to get a temporary elevator, one without a cage on it, in running order so that the George A. Fuller Company could get the use of it but did not recall when such temporary elevator was made ready or installed in the tracks; that the defendant, the Otis Elevator Company, had a separate and independent contract with Mr. Hibbs the owner of the building to construct the elevators in the aforesaid building; and that it was probably about June 1908, although he does not remember the date, that the defendant, the Otis Elevator Company, turned the elevators over to the said owner and received final payment on said contract, under the certificate of the architect; that he could not recall when it was that the passenger cages were put in place
38 upon the platforms of the aforesaid elevators; that he may have seen the painters using the aforesaid elevators; that Joseph Locke was continued in the employ of the Otis Elevator Company until the elevators were turned over to the owner, Mr. Hibbs, and remained in their employ for some time after the work of the Otis Elevator Company, installing the elevators in the Hibbs Building, was finished; that in the early part of the aforesaid work the said Joseph Locke was engaged in the erection of the aforesaid elevators and subsequent to that Locke took care of the elevators and machinery and cleaned them, also acting as the operator therefor;

Thereupon witness was aked the following:

"Q. And your company allowed those elevators to be used by the George A. Fuller Company and you charged them for such use: is that true? A. We charged them for the service of a caretaker and operator. That is the only charge that I recall.

"Q. I thought that that included the service of the machinery and elevator? A. We made no charge for the use of the machines. We charged them for some materials.

"Q. But you did make a profit on the operator's salary, on his wages? A. Yes.

And the witness further testified:

That the foreman of the defendant, the Otis Elevator Company, employed at the aforesaid Hibbs Building, kept an account of the time that the George A. Fuller Company used the elevator
39 and that said foreman reported the time, so taken as aforesaid, to the defendant, the Otis Elevator Company;

Thereupon the witness was asked the following:

Q. What became of the elevators after the George A. Fuller Company stopped using them; did you stop your elevators and take your man off them? A. We cleaned them and made such adjustments as was necessary to complete the plant.

"Q. I mean after the Fuller Company had completed the building and turned the building over to the owner, what did you do with the elevators; did you stop them *down* and take your men off or did you continue the elevators in operation until you turned the elevators over to the owner? A. No; I think that as soon as the Fuller Company had no further use for our man we took him away.

"Q. That is, it is your impression that you took him away, but you do not know personally, do you? A. He may have been there a short time afterwards giving instructions to the operators who were employed by the owner.

"Q. During the time that Locke was running that elevator, was he not also engaged in assisting to install your elevators in the building for the owner. You say he was a helper; was he not also engaged in that work? A. In installing elevators?

"Q. In helping to install; did he not only operate the elevator, but assist the mechanics in getting the plant ready to turn
40 over to the owner? A. At that particular time he was furnished to the Fuller Company; he was engaged in nothing else. At that time he was simply running the car and taking care of the machine.

And the witness further testified:

That when a temporary elevator was installed, as aforesaid, to hoist building materials for the defendant, the George A. Fuller Company, the Otis Elevator Company started to operate the aforesaid elevator with the said Joseph Locke or some other employee of the said Otis Elevator Company but the hoisting engineers objected to that and the Otis Elevator Company was compelled to take its employee off and a hoisting engineer was employed in his stead while building materials were being handled; that after the Otis Elevator Company stopped running the elevator to hoist building material, it, the aforesaid Otis Elevator Company, put its own employee on the elevator again to operate it.

And thereupon the cross examination of the said witness was suspended by counsel for defendant, the George A. Fuller Com-

pany, for the purpose of moving the Court to strike out certain parts of the testimony, on cross examination of the witness, Wilson A. McCloskey, and thereupon the following colloquy occurred;

"Mr. DUVALL: Before I resume the cross examination of Mr. Scott, I wish to make a motion which I should have made at the conclusion of Mr. McCloskey's testimony, to strike out certain matter that was in there, on the ground that it is hearsay. My only excuse for not making the motion at the time is that at that par-
41 ticular time there were some interruptions and I over-looked the matter until Mr. McCloskey left the witness stand. I will read from the testimony, of Mr. McCloskey:

"(Reading:)

"Q. Whom did Locke work for, do you know? A. He was working for the Fuller Construction People, I understood.

"Q. You understood that? A. Yes sir.

"Q. Do you know whom he was working for? A. I am pretty sure of it. He told me so.

"Q. How do you know that? A. He told me he was.

"Q. Locke told you he was? A. He said he was paid by the Fuller People.

"I move to strike that out, because it is hearsay, and also it is a declaration by a servant that would not be binding on the Fuller Construction Company.

"The COURT: Well, gentlemen, it goes to the weight of the testimony and if it had come out in the examination in chief, I think I should have sustained the objection. But you were cross examining the witness. He repeated that several times as you insisted upon the inquiry. Now it will have to stay in there.

"Mr. DUVALL: It was not responsive to the question I asked him.

"The COURT: Just read it again.

"(Mr. Duvall read aloud the testimony as above recorded.)

"Mr. DUVALL (continuing): My question was directed to
42 his personal knowledge and he responds with hearsay, and it is not responsive.

"The COURT: You see though, if that were allowed then cross examination might be indulged in and counsel take the chances of getting what they want, and if they did not care for it, ask that it be stricken out. Now that would not be proper, on the ground that this man was repeating the conversation.

"Mr. DUVALL: It is not entirely on the ground that this man was repeating conversation. It is on the further ground that the declaration of Locke to the witness was not one which would bind the George A. Fuller Company, and for that purpose was incompetent for evidence, under the decision in the Vicksburg case.

"The COURT: It is ruled every day that declarations made by motormen or conductors will not bind the corporation, and such an objection is sustained, but here you brought this out yourself. I don't think it would be proper to grant the motion, for the reason that it was brought out in cross examination and not objected to at the time.

"Mr. DUVALL: Your Honor will allow me an exception?

"The COURT: Yes."

And thereupon the witness further testified that the elevator operator, Joseph Locke, was first employed and placed on the pay roll of the Otis Elevator Company by the latter's superintendent who was supposed to pass upon Locke's qualifications as a workman.

Thereupon, the defendant, the George A. Fuller Com-
43 pany introduced in evidence the following invoice, admitted by counsel to have been delivered by defendant, the Otis Elevator Company, to the defendant, the George A. Fuller Company, which was in words and figures, as follows:

PHILADELPHIA, *August* 14, 1907.

Geo. A. Fuller Company, Munsey Building, Washington, D. C.

"Hibbs Building."

To Otis Elevator Company, Dr.

F-2072.	One man to take care of elevator and operate same during month of July:—	
	26 days at $3.00 for 8 hour day.....	$78.00
Overtime:	27 hrs. " $6.00 " " " "	20.25
		$98.25
F-2148.	One man to take care of elevator and operate same from Aug. 1st to 15th.	
	9 days at $3.00 for 8 hour day.....	$27.00
	6½ hours at $3.00 for 8 hour day.....	2.34
Overtime:—	½ " a day for 9 days at $6. per day.....	3.38
		$32.72
F-1976.	18 75 Amp. Noark Fuses 250 volts.	
	12 Reg. #F 7794 F-1 Noark Fuses.	
	25# Elevator Grease	
	18 Lubricating candles	
	2# Waste.....	$19.75
		$150.72

44 Report of Time on Hibbs Building (July).

July	1	9	hours	July	15	9	hours
"	2	9	"	"	16	9	"
"	3	10	"	"	17	9	"
"	5	9	"	"	18	9	"
"	6	9	"	"	19	9	"
"	8	9	"	"	20	9	"
"	9	9	"	"	22	9	"
"	10	9	"	"	23	9	"
"	11	9	"	"	24	9	"
"	12	9	"	"	25	9	"
"	13	9	"	"	26	9	"
				"	27	9	"
				"	29	9	"
				"	30	9	"
				"	31	9	"

Report of Time on Hibbs Building (August).

August	1	9	hours
"	2	9	"
"	3	9	"
"	5	9	"
"	6	9	"
"	7	9	"
"	8	9	"
"	9	9	"
"	10	9	"
"	12	1½	hrs.
"	13	1	"
"	14	3¾	"

45 The receipted voucher, showing payment by defendant, the George A. Fuller Company, to defendant, the Otis Elevator Company, of the aforesaid invoice, less certain counter charges, was then identified by the witness and introduced in evidence by counsel for the defendant, the George A. Fuller Company, the amount of the voucher being $65.00.

The witness further testified that he had copies of other bills for similar service covered by the aforesaid invoice, that was, for the operation of the elevators; that the elevator operator, Joseph Locke, was, he thinks, taken into the employ of the Otis Elevator Company previous to the construction of the said Hibbs Building, but about this he is not certain; that the arrangement referred to by him, in his examination in chief, which he understood existed between his company and the George A. Fuller Company related only to the use of a temporary make-shift elevator in the Hibbs Building for hoisting building material, and not for the services of a passenger elevator and that the George A. Fuller Company was to operate such temporary make-shift elevator, but at the time aforesaid he placed Joseph Locke upon the aforesaid temporary elevator to run it for the reason that the Otis Elevator Company was responsible to the owner for turning over the elevators in a satisfactory condition, and the Otis Elevator Company did not want the George A. Fuller Company to put on an inexperienced man; that the Otis Elevator Company wanted someone there who could look after the maintenance of the machinery; that previous to the time that the operator Locke was employed under this arrangement; a hoisting
46 engineer ran the car and the said Locke was there to clean the machines and look out for them; that later the said Locke served the two-fold purpose;

Thereupon the witness was asked the following questions:

"Q. Do you not know that you started to operate that elevator with Locke or some other employee of the Otis Elevator Company, and that the hoisting engineer objected to that? A. Yes, I believe that is so.

"Q. And you had to take your man off? And you had to put a hoisting engineer on while they were handling building material; is not that true? A. Yes; I believe that question came up.

"Q. After you stopped running the elevator to hoist building material you put your man back on again; is not that true? A. Yes sir.

"Q. Mr. Scott you stated in answer to a question by the Court, on page 42 of the record, it appears, that you had no personal knowledge as to the arrangement between your company and the Fuller Company, but you thought you had some time-sheets, and a letter from Mr. Fisher, of the Fuller Company. Have you that letter with you? A. Yes. If I may leave the stand I will get it.

(Witness produced a package of letters.)

"Q. You need not take time to find that now. I want to ask you now about this man Locke. Where did you get Locke, where did the Otis Elevator Company get Locke? A. I don't know.

47 "Q. Who employed him? Did you employ him personally, or one of your foremen; who put him on your pay roll? A. Our superintendent usually employs workmen, and he probably did.

"Q. Did he pass upon Lock's qualification for that work? A. He would be supposed to.

"Q. The invoice and receipts which were shown to you yesterday and the statement of time which you charged the Fuller Company began on the 1st of July and ran to the 15th of August. That is correct, is it not? You remember this voucher which you gave (indicating)? Just look at that and state if it is correct? —. ——.

"Q. I will ask you to examine those papers in connection with that voucher and ask you if you have any knowledge of any other bills rendered to the Fuller Company for the service of that elevator or those elevators in the Hibbs Building? A. You mean other than in July?

"Q. Yes. A. Yes sir; there are.

"Q. Bills for the use of the elevator? A. Yes sir.

"Q. Have you those bills with you? A. I think I have carbon copies of them. You probably have the bills; that is, the Fuller Company has the bills.

"Q. Will you produce carbon copies you have of any bills you have against the Fuller Company? A. I think I have them here.

48 "Q. What I asked you was whether you had any bills against the Fuller Company for similar service to the Fuller Company, for the use or for the service which you covered in this invoice here; that is, for the operation of that elevator?

The WITNESS: Yes, I have some carbon copies of bills right here.

By Mr. DUVALL:

"—. Let me ask you about this. When was Locke taken into the employ of the Otis Elevator Company; was it previous to the construction of this Hibbs Building? A. I think so, although I am not certain.

"Q. Was it not a fact that the arrangement which you understood existed between your company and the George A. Fuller Company related merely to the use of what is termed a temporary make-shift

elevator in that building for hoisting building materials, and not for the services of a passenger elevator? A. Yes.

"Q. If that be so, who was to operate that temporary make-shift elevator—you, or the George A. Fuller Company? A. The George A. Fuller Company.

"Q. The George A. Fuller Company was to operate that? A. Yes.

"Q. Then, why did you put Locke upon the elevator—he being your employee—why did you put him there to run that temporary elevator? A. For the reason that we were responsible to the owners for turning over the elevators in a satisfactory
49 condition, and we did not want them to put on an inexperienced man. We wanted someone there who could look after the maintenance of the machinery. Previous to the time that Locke was employed under this arrangement, an engineer, I think a hoisting engineer ran the car, and Locke was there to clean the machines and look out for them. Later Locke served the two-fold purpose.

"Q. Let me ask you this. Is it not a fact that at that time you did not carry Locke upon the time book of the Otis Elevator Company, and did not pay him; the time you sent Locke there to operate that make-shift or temporary elevator, is it not a fact that he was on the time books of the Fuller Company, or his wages paid by them? A. I know that on the date of the accident——

"Q. No; I am asking another question. I will ask the stenographer to read the question.

(The stenographer read the question as above recorded.)

By Mr. DUVALL:

"Q. Do you understand the question?

Mr. FLANNERY: I think that is a very indefinite question.

Mr. DUVALL: I will add to that question, this then:

"Q. That was prior to July 1907? A. I don't know.

"Q. You don't know that? You have already stated that you know that you were to furnish Locke, and that there was a protest from the hoisting engineers? A. Yes.

50 "Q. And Locke was taken off, and the Fuller Company then had to employ hoisting engineers. What was done with Locke then; was he still continued in the building to look after the machinery and the elevators, to see that they were properly kept up? A. To what time have you reference?

"Q. Prior to July, 1907; prior to the day of this voucher (indicating)? A. That, I do not recall.

"Q. Is it not a fact that after the hoisting of building material had ceased in that building, this arrangement, the Fuller Company made, ceased and at the time you installed the passenger cages upon those platforms you then put Locke back upon the time books and pay roll of the Otis Elevator Company and put him inside the car and made him look after the car and machinery? That was the end of June, was it not, 1907? A. Why did the Fuller Company pay for his time if he was not rendering them a service?

"Q. Don't ask me questions; I am asking you a question. I

want to ask you Why was it that Locke was carried on the pay roll of the Fuller Company up to the time that you put passenger cages on, but after that you took him back in your employ and he took full charge of the car and ran the car and you made him look after the machinery?

Mr. FLANNERY: I do not see that that is material at all.

The COURT: The objection is sustained on the ground that it assumes something that is not in the testimony.

51 Mr. DUVALL: I will withdraw the question, then and put it in this form.

By Mr. DUVALL:

"Q. Have you any more definite idea now than you had yesterday as to when you installed your passenger cages on the platform? A. No.

"Q. Prior to July 1907, was it not? A. I don't know.

"Q. I will ask you why was it that Locke was taken into the employ of the Otis Elevator Company on or about July 1st, 1907, when you state that he was paid by the George A. Fuller Company some time while that temporary elevator was being used?

Mr. FLANNERY: I object to that question. I do not think we ought to assume facts that are not in evidence. If Mr. Duvall has any facts in reference to Lock's prior service, he can go to work and put those facts in evidence and examine Mr. Scott; but I do not think it is proper to assume facts that are not in evidence and try to bring out an answer to confuse the witness.

Mr. DUVALL: This witness has testified that these were the bills rendered to the Fuller Company for the service of the elevator and for the operator; that is for the full use of the machines. And that was according to the statements he has made. Of course, that is contrary to our contention; but nevertheless it is in evidence that on the 14th of August, they rendered bills in a certain sum, for $150.72,

52 for different items, such as taking care of elevator and operating the same, and for fuses, elevator grease, lubricating candles and waste, and so forth. It also appears that Locke was the man who was running this elevator. Further, it appears that this man Locke was in the employ of the Otis Elevator Company and he was selected by the Otis Elevator Company. He was sent there to look after the machinery of the Otis Elevator Company. He was paid by the Otis Company. In other words, prior to July 1st, 1907, he was paid by the Fuller Company, for some time prior to that; and then on the first of July they commenced to pay him and charge it to the Fuller Company, a different amount of wages. Now I ask you why that was?

The COURT: Is that your question why that is?

Mr. DUVALL: Yes, why it was that there was a transfer of this man from the books of the Otis Elevator Company to the Fuller Company. When the temporary elevator was in place, he was transferred to the Fuller Company, and then afterwards he was transferred back from the Fuller Company to the Otis Company.

That was at the time this bill was rendered, or at least at the first date in this bill.

The COURT: If that is what your question means I do not understand it.

Mr. FLANNERY: Where is the evidence of transfer?

Mr. DUVALL: In the statement of the witness that this bill covered services, for an operator, and the testimony is that Locke was running that elevator all the time.

Mr. FLANNERY: But where is evidence of transfer from one pay roll to another?

(Further discussion followed.)

The COURT: Ask the direct question. I do not recall now what the witness said about that. Ask him, in the first place, whether they did transfer him from their books.

53 Mr. DUVALL: I will accept your Honor's suggestion and ask that question. I was under the impression that I had put it before.

By Mr. DUVALL:

"Q. Is it not a fact that when you sent Lock to the Hibbs Building the George A. Fuller Company then paid his wages, and not the Otis Elevator Company? A. May I say to the Court——

The COURT: No; answer yes or no first, and then make any explanation you wish to.

"A. My recollection in that regard is too indefinite to be able to answer the question.

"Q. What do you mean by "too indefinite"? Have you any knowledge as to that at all? You stated yesterday that you had time sheets showing that this man was charged to the Fuller Company at this time, did you not? A. Yes, sir.

"Q. Now, did those time sheets also show whether he was charged to the Fuller Company in April of the same year? A. I don't recall. I can look at the time sheets and see.

"Q. Suppose you do, then, Mr. Scott.

Mr. FLANNERY: While the witness is looking for that, your Honor, I simply want to suggest to the Court that it seems to me that this whole line of examination is utterly immaterial to the issues here. We are not concerned with what arrangement existed between the Fuller Construction Company and the Otis Elevator Com-

54 pany at the Hibbs Building prior to the time of the accident or in reference to some other building prior to the time of the accident. We are concerned with the arrangement in force at the time of the accident.

(Argument and discussion followed.)

The COURT: As I have tried to suggest several times, I must confess that I have been confused myself as to what was being sought. I thought it was to test the witness.

Mr. DUVALL: This is to that point; also testing his credibility.

The COURT: I do not exactly see how you can test his credibility by trying to show that in April there was some arrangement made that was terminated the first of July. As I understand, you insisted that something was done that the witness agrees to.

Mr. DUVALL: I merely asked him the question why that was, why he took this man Locke back when passenger elevators were installed, when the cages were put on.

Mr. FLANNERY: I believe in confining the testimony to the issues of the case. I see no reason for testing the credibility of the witness, a witness whose credibility has not been attacked. I see no ground for such a suggestion.

Mr. DUVALL: Well, I will put it in another form. I do not want to hurt the feelings of the witness.

The COURT: What was the question?

Mr. DUVALL: I asked him why it was that this man was transferred?

55 (Upon request the stenographer repeated the question as follows:)

"Q. Now, did those time sheets also show whether he was charged to the Fuller Company in April of the same year? A. I do not recall. I can look at the time sheets and see.

"Q. Suppose you do, then, Mr. Scott."

The COURT: You can answer that question.

By Mr. DUVALL:

"Q. Can you ascertain whether in April Mr. Lock was on those time sheets? A. The time sheets which I have for April are for making some repairs which have no reference to this running of the passenger car. I have some time-sheets for May, for nearly the whole month of May.

"Q. No; I asked you about April? A. I see none for April.

"Q. Then, what have you to say as to whether he was in the employ of the Otis Elevator Company in April or not?

Mr. FLANNERY: I object to that.

The COURT: Objection sustained, and you may have an exception.

Mr. DUVALL: Now I will renew the question I put before. I do not think it was answered.

The COURT: What was it?

56 By Mr. DUVALL:

"Q. Why was it the Otis Elevator Company did not pay Locke for services at the Hibbs Building between the time that he was sent there by the Otis Elevator Company, some days between the time he was sent there and the first of July, and was afterwards paid directly by the Otis Elevator Company and not by the Fuller Company?

Mr. FLANNERY: We object to that.

The COURT: Objection sustained.

Mr. DUVALL: We ask your Honor to note an exception.

The COURT: The objection is sustained on the ground that the question assumes a state of facts, which has not been proven.

Mr. DUVALL: The Court will allow an exception.

The COURT: Yes.

By Mr. DUVALL:

"Q. There is no question, is there, that Locke was in your employ at the time these bills were rendered, from July, 1907, on; is there? A. No.

Thereupon the witness having been asked the following:

"Q. Then what have you to say as to whether he was in the employ of the Otis Elevator Company in April or not?

To which counsel for the defendant, the Otis Elevator Company thereupon objected and the court sustained the objection and
57 counsel for the defendant, the George A. Fuller Company, then and there excepted to the ruling of the Court.

Thereupon the witness having been also asked the following question:

"Q. Why was it the Otis Elevator Company did not pay Locke for services at the Hibbs Building between the time that he was sent there by the Otis Elevator Company, some days, between the time he was sent there and the first of July, and he was afterwards paid directly by the Otis Elevator Company and not by the George A. Fuller Company?"

To which said question counsel for the defendant, the Otis Elevator Company, objected and the Court sustained the objection, on the ground that the question assumed a state of facts not proven; and thereupon counsel for the defendant, the George A. Fuller Company, then and there excepted to the ruling of the Court.

The witness further testified that there was no question that the said Locke was in the employ of the Otis Elevator Company during the period covered by the aforesaid invoice, from July 1907, on; that during that period, the elevator operator, Joseph Locke, could not have been discharged by the George A. Fuller Company; that the defendant, the George A. Fuller Company, had no authority to discharge the said Locke while he was at work about the said elevators or while operating the said elevators, during the aforesaid period, and that they did not have any such authority on the day of the accident to the plaintiff, that is, on the 9th day of
58 August, 1907; that the George A. Fuller Company could only have made a request of the Otis Elevator Company to discharge Locke, and if the reasons warranted it, he, the said Joseph Locke, would have been discharged; that the defendant, the George A. Fuller Company, had no authority, on the date of the accident, to take the said elevator operator, Joseph Locke, off the elevator in question and substitute another operator in his place there; that the George A. Fuller Company could have made a request to the Otis Elevator Company to substitute another operator for him; that the superintendent of the Otis Elevator Company placed the said Joseph Locke at work in the Hibbs Building for the purpose of running the said elevator and that the George A.

Fuller Company had nothing to do with the selection of the said Locke as an employee for the purpose of running the said elevator, on the date of the accident, or at any other time; that he, the witness knew, during July or August of 1907, to what use the elevators were being put by the painters for their work; that he knew that the George A. Fuller Company turned the said building over to the owner, Mr. Hibbs, long prior to the time he turned the elevators over and received final payment therefor; that in the interval between the turning over of the building by the George A. Fuller Company and the acceptance of the elevators by the owner the elevators were continued to be run but they were not operated by employees of the Otis Elevator Company; thereupon the witness was asked the following question:

"Q. Did you ever have any arrangement with Mr. Hibbs for the operation of those elevators after the Fuller Construction
59 Company completed the building and the tenants were in there?"

To which question counsel for the defendant, the Otis Elevator Company, objected and the Court sustained the objection and thereupon counsel for the defendant, the George A. Fuller Company, then and there noted an exception.

Thereupon the witness was immediately asked the following question:

"Q. Was he (meaning Joseph Locke) employed by someone else or was he in turn employed by Mr. Hibbs?"

To which question counsel for the defendant, the Otis Elevator Company, objected and the Court sustained the objection, and thereupon counsel for defendant, the George A. Fuller Company, noted an exception.

The witness then testified that he did not recall that the Otis Elevator Company had any interest in the running of the elevators, subsequent to the date of the accident and thereupon witness was asked the following question:

"Q. Who took Locke off then?"

To the answering of which, counsel for the defendant, the Otis Elevator Company, objected, on the ground that it was subsequent to the accident, and the Court sustained the objection, to which ruling of the Court counsel for the defendant, the George A. Fuller Company, duly excepted.

At the time of noting the exception counsel for the George A. Fuller Company stated to the Court the purpose of the question was to ascertain who dispensed with his (Locke's) services and for
60 the further purpose of showing the employment.

On further cross examination the witness then testified that he did not recall the reason why the George A. Fuller Company was not permitted to put an operator in the car during the period that he billed the said George A. Fuller Company during July and August and the date of the accident herein; that he doubted very much that he would have permitted the George A. Fuller Company to have any other man to run the aforesaid elevator, owing to the cars being nearly completed and the necessity of the Otis Eleva-

tor Company keeping the machines in good order, inasmuch as it was responsible to the owner to turn them over in good condition.

On cross examination, by counsel for defendant, the Otis Elevator Company, the witness testified that the aforesaid invoice to the George A. Fuller Company did not include anything for the use of the elevator itself; that no bill was rendered to the George A. Fuller Company for the use of said elevator during the time covered by the said invoice; that no bill was rendered to the George A. Fuller Company for the use of the machine, for elevator service during that time; that the aforesaid invoice which his company rendered to the George A. Fuller Company for the service of a man to take care of the elevator and operate same during the months of July and August, up to and including August 9, did not cover any work which that man did for the Otis Elevator Company during the time covered by said invoice; that during the period of time covered by the aforesaid invoice, the said elevator operator was in a way subordinate to the Otis Elevator Company's foreman, who had charge
61 of that work in the Hibbs Building but during that time the said operator was ordered when to use the elevator for it and when not to use it, by the George A. Fuller Company's representative; that he had no knowledge of his company ordering the said Locke to do any work for his company, during the time Locke was operating the car; that if any complaints were made to the Otis Elevator Company by the George A. Fuller Company concerning the said Locke they never reached him; that only those complaints of a serious nature would probably have come to his attention; and if the George A. Fuller Company had requested him to replace the said Locke with another operator, such request would undoubtedly have been granted.

Thereupon on further cross examination by counsel for defendant, the George A. Fuller Company, permission being granted for same by the Court, the witness testified that the said Joseph Locke reported to the Otis Elevator Company, this accident to the plaintiff.

On redirect examination the witness further testified that the defendant, the George A. Fuller Company, was the general contractor for the construction of the aforesaid Hibbs Building but that the Otis Elevator Company's contract for the elevators constructed and installed by the said Otis Elevator Company, was not made with the George A. Fuller Company but was a contract between the Otis Elevator Company and Hibbs and Company.

On recross examination, by counsel for the defendant, that George A. Fuller Company, the witness further testified that during
62 the period covered by the aforesaid invoice to the George A. Fuller Company, the elevator operator, Joseph Locke, may have put in part of a day for the Otis Elevator Company and part for the George A. Fuller Company but he could not say as to the exact arrangement in each day; that all that the George A. Fuller Company had to do with the elevator and the operator, was to tell the operator what floors to go up to, when to stop, what to carry up, and to say how long they wanted the operator; that this was arranged with the elevator operator, and that he, the said operator kept the time.

The examination of said witness being concluded, the plaintiff, to maintain the issues on his part joined, introduced in evidence, the contract between the defendant, the George A. Fuller Company, and the Robert E. Mackay Company, dated December 24, 1906; the letter of proposal for doing the aforesaid painting work, dated December 14, 1906, from the said Robert E. Mackay Company to the said defendant, and an order for extra work from the said defendant to the said Robert E. Mackay Company, dated February 26, 1908, which were, in words and figures, as follows:

63

Robert E. Mackay, Pres. & Mgr. Joseph J. Mooney, Vice Pres. & Supt. Robert H. McCork, Coun. & Sec.

Robert H. Mackay Company,
Painting and Decorating,
208 West 17th Street.

NEW YORK, *Dec.* 14, 1906.

Re Hibbs Building.

Geo. A. Fuller Co., Munsey Building, Washington, D. C.

GENTLEMEN: We propose doing all painting, hardwood finishing, lettering etc., on the above building according to the revised plans and painting specification, but not including the back painting of plumbing fixtures for the sum of twenty-four hundred—2400—dollars.

NOTE.—In case elevator fronts from second story up are painted two coats of drop black, add sixty-eight—68—dollars.

Respectfully,

ROBERT E. MACKAY CO.
ROBERT E. MACKAY.

The contract was in words and figures, as follows, all paragraphs thereof not material to the issues in this cause, being omitted:

64

No. 21.

Agreement, made December 24th, 1906, between the Robert E. Mackay Company of New York City, hereinafter designated the Sub-Contractor, and the George A. Fuller Company, a corporation organized under the laws of the New Jersey, hereinafter designated the Contractor.

Witnesseth that the Sub-Contractor, in consideration of the fulfillment of the agreements herein made by the Contractor, agrees with the said Contractor, as follows:

First. The Sub-Contractor, under the direction and to the satisfaction of Messrs. Bruce Price and de Sibour, Architects, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said architects and identified by the signatures of the parties hereto for all the exterior and interior painting and decorating, in accordance

with the plans and specifications and addenda to same, as identified by the signature of the sub-contractor, for the Hibbs Building located on Fifteenth Street, between New York avenue and H street, N. W., Washington, D. C.

This contract to include all painting with the exception of the structural steel, the shop coat on the ornamental iron, and the priming of frames and sash.

Second. (Relates to drawings and explanations and is omitted because not material to the issues in this cause.)

Third. It is further understood and agreed that the Sub-Contractor shall not, under any circumstances be entitled to allow-
65 ance for any extra work unless the Sub-Contractor shall produce a written order to do such extra work signed by a properly authorized officer or agent on behalf of the Contractor.

Fourth. (Relates to facilities for inspection by Architect and Contractor and is omitted because not material to the issues in this cause.)

Fifth. (Not material to the issues in this cause and therefore omitted.)

Sixth. (Not material to the issues in this cause and therefore omitted.)

Seventh. (Not material to the issues in this cause and therefore omitted.)

Eighth. (Not material to the issues in this cause and therefore omitted.)

Ninth. (Not material to the issues in this cause and therefore omitted.)

Tenth. (Not material to the issues in this cause and therefore omitted.)

Eleventh (Not material to the issues in this cause and therefore omitted.)

Twelfth. (Not material to the issues in this cause and therefore omitted.)

Thirteenth. (Refers to payment and in substance is as follows:) It is hereby mutually agreed between parties hereto that the sum to be paid by the Contractor to the Sub-Contractor for said work and materials shall be two thousand, four hundred ($2400.), and that such sum shall be paid in current funds by the Contractor to
66 the Sub-Contractor, in installments, as the work progresses. * * *

Fourteenth. The Sub-Contractor shall complete the several portions and the whole work comprehended in this agreement by and at the time or times stated below:

The Contractor shall keep in touch with the progress of the general work and shall install his work at such times as not to delay or conflict with other work.

The Sub-Contractor shall prepare all materials in sufficient time to be ready to install any portion of his work, and he shall begin to install such portions as the contractor may direct upon three (3) days' notice from the contractor.

The sub-contractor shall at all times make progress satisfactory to the contractor, failing which the 5th and 7th clauses above shall be the penalty.

Fifteenth. No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the Contractor. * * * (The remainder, indicated by stars, is not material to the issues in this cause and is therefore omitted.)

Lastly. This agreement shall bind the executors, administrators, successors, and assigns of the parties hereto.

In witness whereof, the parties hereto have signed this agreement.

GEORGE A. FULLER COMPANY,
By JAMES BAIRD, *Mgr.*
ROBERT E. MACKAY CO.
JOS. MOONEY, *V. P.*

In presence of—
—— ——.

67 *Order for Extras.*

No extra work will be paid for except upon written order signed by the George A. Fuller Company by its authorized agent as written in original contract.

No. —. $75.75.

George A. Fuller Company,
Munsey Building.

WASHINGTON, D. C., *Feb.* 26, 1908.

To Robert E. Mackay Co., New York city:

We hereby accept your proposition dated —— —— for the following described work at the Hibbs Building, viz:

Re-lettering 2nd, 6th and 7th floor toilet room doors, touching up walls in elevator shaft, also repainting walls of 10 office closets, and adjustment of charge for cleaning floors and you are hereby authorized to add the sum of Seventy-five 75/100 dollars ($75.75) to your contract dated Dec. 24, 1906, for the painting work on the above mentioned building, Hibbs.

It is understood that the above work must be done in accordance with the plans and specifications of Messrs. Bruce Price & de Sibour Architects, and to their satisfaction.

Yours very truly,

GEORGE A. FULLER COMPANY,
By JAMES BAIRD, *Manager.*

68 Thereupon the plaintiff to maintain the issues on his part offered in evidence and read to the jury the deposition de bene esse of ROBERT E. MACKAY. The witness testified that he was the president of the Robert E. Mackay Company at the time that the said Company under its contract with defendant, the George A. Fuller Company, did the painting and hard wood finishing in the Hibbs Building on 15th Street between New York Avenue and H Street, Northwest, in Washington, D. C., and the witness thereupon pro-

duced a duplicate original of the said contract and the same was introduced in evidence by the plaintiff and attached to the deposition of the witness and the said contract was in words and figures the same as hereinbefore set out; the witness further testified that the labor required by the aforesaid contract was employed and paid for by the said Robert E. Mackay Company who had a foreman in Washington to superintend the work; that the said foreman was Robert E. Minte; that in the course of the Robert E. Mackay Company's work in the painting of the Hibbs Building it used the elevator to paint the elevator shaft as they always did in big buildings and the general contractor in this instance charged therefor as is the universal custom in the same work; that the Robert E. Mackay Company paid One Dollar an hour to the George A. Fuller Company for the use of the elevator and thereupon the witness, on request of counsel for the plaintiff, produced an invoice rendered to the Robert E. Mackay Company by the George A. Fuller Company and the said invoice was introduced in evidence by the
69 plaintiff and attached to the deposition of the witness, and was in words and figures as follows:

(Copy.)

WASHINGTON, D. C., *Aug.* 19, 1907.

Robert E. Mackay Co., New York City.

19. To George A. Fuller Company, Dr. Building Construction, Munsey Building.

Hibbs Building.

All claims for errors must be made within five days.

For use of electric elevator in painting elevator shaft and tracks.

July	29.	4	hrs.	at	$1	
Aug.	3.	1	"	"	"	$4.00
"	5.	6	"	"	"	1.00
"	7.	5	"	"	"	6.00
"	8.	6	"	"	" Chgd	5.00
"	9.	3	"	"	"	6.00
						3.00
						$25.00

And thereupon the witness further testified that the aforesaid invoice was paid by the Robert E. Mackay Company; that the contract for the hire of the use of the said elevator from the George A. Fuller Company was not in writing; that he did not know by whose employee the said elevator was operated; that it was not operated by his employee; that during the time that the Robert E. Mackay Company hired the said elevator for the purpose he had stated, his company used it for painting the elevator shaft and that his com-

pany had the use of the said elevator for the time it was charged for; that during the time his company had the said elevator in use, no one else had the right to use it; that the George A. Fuller Company
70 charged him only for the time he used the elevator to paint the shafts; that the name of his foreman was Robert Minte; that the plaintiff was in the employ of the Robert E. Mackay Company on August 9, 1907 and was at work in the Hibbs Building.

Upon cross examination by counsel for defendant, the George A. Fuller Company, the witness testified that the hiring of the said elevator by the Robert E. Mackay Company also included the hiring of an operator for the same and that he supposed the Robert E. Mackay Company's painters who were working on top of the said elevator, directed the movements of the same while the shafts were being painted and that they told the operator to go up or down.

Upon redirect examination the witness testified that he himself did not hire the operator and that he did not have any control of the operator nor the right to discharge him; that he had the right to direct him where to stop and when to go on to suit the convenience of his workmen and that so far as he knew that was all of the control which the Robert E. Mackay Company had over the elevator operator.

Upon recross examination the witness testified that the only persons who had any say as to the movements of the said elevator were the plaintiff and the other men supposed to be on the said elevator and also the foreman of the Robert E. Mackay Company; and that whoever was on the elevator doing the painting, was the only one who could say anything as to its movements.

Thereupon the plaintiff to further maintain the issues on his part, introduced in evidence and read to the jury, the deposition
71 de bene esse of ROBERT MINTE. The witness testified that he was employed by the Robert E. Mackay Company of New York City, as foreman, and had been in such employ nearly three years; that on the 9th day of August, 1907, the Robert E. Mackay Company was employed by the George A. Fuller Company and was engaged in painting the elevator shaft of the aforesaid Hibbs Building and that the plaintiff was then in the employ of the said Robert E. Mackay Company; that the said Robert E. Mackay Company had the use of the elevator in the said building on the date aforesaid and that he made the arrangement for the use of the said elevator, with Mr. Baird, the manager of the George A. Fuller Company and in answer to a question by counsel for the plaintiff, to state the facts about the hiring of the said elevator, its extent, and what it was to include, the witness testified as follows, the exact language of the witness being quoted here:

"A. Well, we hired the elevator for the purpose of painting the shaft. I went to see Mr. Baird a couple of months before that time, and made arrangements with him to use the elevator for the painting of the shaft, with the understanding that I was to use this elevator, and no passengers were to be carried, and I was to turn it over to the George A. Fuller Company at any time that

they had any material to carry on it—these were the arrangements that I made with Mr. Baird."

And thereupon the witness further testified that he did not make any arrangements as to the terms of payment.

72 Thereupon the witness was asked the following question:

"Q. What did the hiring of the elevator include—as to motive power, operator, use of elevator, and so forth? A. Well it included everything—the men to run it and all, because I did not have any man to run it.

And the witness further testified: That his Company did not pay the operator and he did not know who did; that he did not know who paid for the motive power but the Robert E. Mackay Company was charged for the whole; that he had no control over the elevator operator; that it was customary to paint the elevator shaft from the top of the elevator and if they had used scaffolding instead, they would have had to shut down the elevators entirely. In the testimony of the witness up to this point there was no statement by him that the Robert E. Mackay Company had no control over the operator and thereupon the witness was asked the following question:

"Q. You have stated that you, or the Robert E. Mackay Company had no control over the operator. A. No; I had not, and the Company had none."

"Q. None whatever? A. Well, just to tell them where to go and where to stop of course I had that; the control over the men."

"Mr. DUVALL: I object to that question as leading, and as containing a misstatement of the answer of the witness."

And thereupon counsel for defendant, the George A. Fuller Company urged the said objection before the Court but the

73 said objection was overruled and counsel then and there excepted to the ruling of the Court.

And the witness further testified that the only control which he had over the aforesaid operator was to tell him when he wanted him to stop and start while his men were on the car and also where to go to and that his men while using the car had the same control that he had; that it was up to his men to give the orders while they were working on the car; that he did not know who had the right to discharge Joseph Locke, the elevator operator, or who had any control of that character over the said Locke, but the Robert E. Mackay Company did not have it; that he did not know how the said operator came to be on the said elevator, nor whose work he was doing.

Upon cross examination by counsel for defendant, the George A. Fuller Company, the witness testified.

"Q. You say that the elevator was hired by you for the Robert E. Mackay Company? A. Yes.

"Q. Was it hired by the day, or by the hour? A. By the hour I know.

"Q. And during that hour, or that time, did you have exclusive

use of that elevator, or of those elevators? A. Well, some times I did not have it half an hour when I had to give it up again, so you see I never had it, perhaps for a full hour at the time.

"Q. For what purpose did you have to give it up? A
74 For carrying material.

"Q. Well, did you have any request to give it up for the purpose of carrying material, and, if so, from whom? A. Well, Fisher requested it—he was the superintendent—he came to me and asked for it.

"Q. He was superintendent for whom? A. For the George A. Fuller Company.

"Q. Well, what occurred on any occasion when he requested the use of the elevator car for moving material? A. Well, this Mr. Fisher came to me and requested me to take my men off the car so that he could have the car for carrying up his material.

That the said superintendent always came to him with the request for the use of the elevator whenever he wanted to carry up material for the George A. Fuller Company and that he never knew of an instance when the said superintendent ever took the elevator from the Mackay Company and used it for any purpose without consulting him; that the superintendent had occasion to use it eight or ten times prior to August 1, 1907, and each time he, the superintendent, went to him, the witness, and requested him, the witness, to take his men off the car so that he, the superintendent could have the car to carry up his material; that he kept the time that he used the said elevator for the Robert E. Mackay Company, by noting the time when his men went on the car and the time when the men left the car
75 and that this was true of the time his Company used the said car or elevator on the 9th of August, 1907, the date of the accident; that his company, on said day, used the said east elevator, mentioned in the plaintiff's declaration, between three and four hours; that on one occasion prior to August 9th, 1907, he ascertained that the said operator had carried passengers up in the elevator during the time that his Company had rented the said elevator and he spoke to the operator about it; that the operator, the said Joseph Locke, told him on that occasion that he would not take any orders from him, or from Mr. Fisher, who was then the superintendent of the George A. Fuller Company, and that he would only take his orders from the Otis Elevator Company; that this was the only instance, to his knowledge, when the said operator carried passengers during the time he had rented it for the Robert E. Mackay Company; that the arrangement between him and the said Mr. Baird, the manager of the George A. Fuller Company, was that at such times as he needed the elevator, he could have the exclusive use of it and that the only exception thereto was to be when the George A. Fuller Company wanted to haul material, the Robert E. Mackay Company would turn the said elevator or elevators over to the said George A. Fuller Company upon request; that he had the authority to stop the use of the said elevator or elevators and told his painters when to stop the painting in the shafts, and that whenever he wanted to stop using the said elevators he took his men off; that on the day

of the accident his painters were touching up some spots in the elevator shaft which had been replastered and that for this
76 purpose the said elevator was stopped and held at different points in the said east elevator shaft; that he did not know of any interruption to the running of the car or elevator by the Robert E. Mackay Company during the three or four hours on August 9th, 1907, that the said Robert E. Mackay Company was using it; that the work which the Robert E. Mackay Company did in the elevator shafts consisted of the painting of the walls thereof and the structural iron work, comprising all I-beams which entered the wall, the grating above the shafts and all other iron work therein, including the elevators, front doors and also the sides; that he did not know what the arrangement was between the Robert E. Mackay Company and the George A. Fuller Company, concerning the pay for the said elevators, nor what it was to include; that on the occasion when he told Mr. Fisher, the superintendent of the George A. Fuller Company, about his, the witness's, discussion with the aforesaid elevator operator relative to carrying people inside of the elevator during the period when the Robert E. Mackay Company had hired the said elevator, the aforesaid Fisher told him that he, the said Fisher, "can do nothing as the men will not take any order from me;" that on the same occasion he spoke to another employee of the George A. Fuller Company about it and told him that the elevator was carrying passengers, and that he, the witness, did not think it was right, as the Robert E. Mackay Company was paying for the use of the car, and he, the witness, could not keep track of the time the Robert E. Mackay Company used it, and that he
77 did not intend to pay for the car while it was carrying passengers; that the only passengers carried were mechanics, but whose he did not know; that the Robert E. Mackay Company was using the aforesaid elevator as a sort of movable stage and that his painters had the authority in his absence to give the orders to the aforesaid operator where to take them to and where to stop, that is, where they had their work to do; that it would have been more expensive to have used a stage, constructed from the bottom of the elevator shaft up, than painting from the top of the aforesaid elevator, but he could have done it, although that would have tied up the elevator.

On redirect examination the witness testified that he could have also used a swinging scaffold to paint the aforesaid elevator shaft but it would have tied up the elevators by doing that and would have inconvenienced the Robert E. Mackay Company and everybody in the building besides tying up the elevators; and that his arrangement with Mr. Baird as aforesaid, was for the whole use of the elevator, the operator, the power to run it and all.

Thereupon the witness testified as follows:

Q. I will ask you—when you hired the elevator from the George A. Fuller Company, what did that hiring include—in other words, what was their company to furnish to the Robert E. Mackay Company?

Mr. DUVALL: I object to the question as being a repetition; also

on the ground that the witness has fully testified in his examination in chief as to the arrangement which he made with Mr. Baird, as to the use of these elevators.

78 A. Well, my arrangement was for the whole use of the elevator, operator and all.

Q. How about the power to run it? A. It was not spoken of; of course I had to have the power to run it.

Q. A question was asked you a while ago by Mr. Duvall as to what you knew of your own knowledge as to what was included in the hiring of that elevator, and what was to be paid for it, and that is the reason I asked you the preceding question—your answer to that question was "No." Do you desire to make any explanation of that answer?

Mr. DUVALL: I object to that question on the ground that misquotes counsel for the defendant; also on the ground that the witness has fully answered the question; and further, that the question is leading and highly suggestive of the answer required of this witness.

A. I cannot give you any explanation on that at all; I don't know anything about that.

Q. About what are you speaking now? A. The talk there is about the money matter.

Q. Then, when you answered "No" you had reference to what was paid and not what was included in the hiring? A. That is it.

The foregoing questions and answers were read to the jury, none of the objections thereto being urged by counsel.

On recross examination the witness further testified that he told counsel for defendant, the George A. Fuller Company, some-

79 time prior to the giving of his deposition, that his, the witness' arrangement with the said Mr. Baird was that he, the said witness, should have this car, and no passengers were to be carried and that he was to have the exclusive use of the same for his painters and that the only time that he was to give up the said elevator was when the George A. Fuller Company wanted to carry up material and then the George A. Fuller Company, through its building superintendent would make the request for the said elevator, directly to him, the witness, who was then to turn it over to the George A. Fuller Company.

On cross examination, by counsel for defendant, the Otis Elevator Company, the witness testified that on August 9, 1907, the building aforesaid was nearly completed and there were tenants in it; and that the painting work by the Robert E. Mackay Company was completed December 16, 1907.

Upon further redirect examination, the witness testified that the Robert E. Mackay Company was engaged from May 15th to December 16th, 1907, in the painting of the elevator shafts.

Thereupon the plaintiff, further to maintain the issues on his part joined, called in order, Doctors Charles S. White, L. D. Richelderfer and James Tubman, who testified in detail to the extent of the plaintiff's injury.

Thereupon the plaintiff rested his case and counsel for the defendant, the Otis Elevator Company, moved, upon the foregoing, which was all the evidence in the case, the Court to instruct the jury to return a verdict in favor of the said defendant and at the same time counsel for the defendant, the George A. Fuller Com-
80 pany, notified the Court of his intention to make a similar motion, based on slightly different grounds to that urged by counsel for the other defendant herein. And thereupon after argument by counsel for defendant, the Otis Elevator Company, the following colloquy occurred:

"The COURT (after argument): If you think the position of the "Otis Elevator Company is a correct one, Mr. Hayden, you should "state to the Court.

"Mr. HAYDEN: It is a question that has given us great concern. "We have not hardly known just where the responsibility was. But "as we have gone further into it, we are very much inclined to take "some decided action, or at least withdraw any objection so far as "the Otis Elevator Company is concerned, and let the Court rule "upon it.

"The COURT: Then you want the Court to rule upon it?

"Mr. HAYDEN: Yes sir.

The Court sustained the said motion, brought by counsel for the defendant, the Otis Elevator Company, and then and there ruled as follows:

"The COURT: I do not think you have presented a case against the "Otis Elevator Company here. While it is true that this man was "under the control, to some extent, of the persons to whom he had "been hired for a profit, I do not see that that makes any differ-"ence so far as this plaintiff is concerned, and the question that I sug-"gest to the counsel it seems to me is independent of that fact. If
"a man hires a person under a contract of service to another
81 "party as a builder, and so on, and that person undertakes to "hire him out, to sub-contract, if I may use that term in "this connection, puts a temporary authority, in other words, in the "hands of a third party under a special contract, it would seem to me "to be rather an extreme doctrine that the party to whom the man is "hired can again rehire that man to somebody else, whose employ-"ment might be very much more hazardous; not applying to this "particular case, but the principle is the same; and then to hold the "original master responsible for something he may not have "known—it not appearing in this case that he did know it. That, "in my judgment, would be a very serious question, and I content "myself by deciding the case as it is presented upon the theory that "he was not in the actual control of this servant, but that it was in his "hands, and I therefore think the defendant, the Otis Elevator Com-"pany, ought to be discharged from responsibility for this accident. "The verdict will therefore be in favor of the Otis Elevator Company. "Of course, you can take an exception if you want to."

"Mr. HAYDEN: I do not think we wish any exception.

"The COURT: Very well; I guess the jury had better be directed to

" return a verdict in favor of the defendant, the Otis Elevator Com-
" pany."

Accordingly the jury was instructed to return a verdict in behalf of the defendant, the Otis Elevator Company, and did so return a verdict as aforesaid.

82 And thereupon counsel for the defendant, the George A. Fuller Company, moved, upon the foregoing, which was all the evidence in the case, the Court to instruct the jury to return a verdict in favor of the defendant, but the Court overruled said motion, to which ruling of the Court the said defendant, by its counsel, then and there duly excepted.

Thereupon, in order to prove the issues joined on its part in said case, the defendant, the George A. Fuller Company, produced FRANCIS J. FISHER as a witness in its behalf, and he testified that he was superintendent for Harry Wardman; that on the 9th day of August 1907 he was employed on the Hibbs Building, by the George A. Fuller Company, to superintend the work of finishing up and had been so engaged for about three months; that prior to that he started in as timekeeper; that his duty as such timekeeper was to keep the time of all the men employed on the building by the George A. Fuller Company and as superintendent his duty was to look after the work in general and finish up, also keeping the time in addition to his duty as superintendent; that on August 9th, 1907 the aforesaid Joseph Locke was not in the employ of the George A. Fuller Company nor had the said Locke been in the employ of the George A. Fuller Company since the 1st day of July, 1907; that the said Joseph Locke was in the employ of the defendant, the Otis Elevator Company, who was paying him, the said Locke, and that the latter was operating the said elevators on August 9th, 1907; that on said date the aforesaid elevator, which caused the accident, was being

83 used by Robert E. Mackay Company's painters who were painting the east elevator shaft; that there were two elevators in the building, the one nearer the entrance to the building being designated by him the right hand elevator and the other, the left hand elevator; that the painters were using the one farthest from the door of the building which was the east elevator; that they had been working in the shaft of that elevator, off and on, for about a month and on August 9th, 1907 they began work in the same shaft at 7:30 in the morning; that while the painters were using the said elevator, the aforesaid operator, Joseph Locke, was under the orders of the Robert E. Mackay Company's men; that he told the aforesaid Joseph Locke that he, the said Locke, must receive his orders from Robert Minte, the foreman for the Robert E. Mackay Company, or Minte's representative; that on this occasion when the painters of the Robert E. Mackay Company were using the said elevator or elevators for painting, no supervision in the doing of the painting work in the shaft, was exercised by the George A. Fuller Company and no directions or orders relative to the doing of the painting work, as aforesaid, were given by the George A. Fuller Company and that on the date aforesaid or at any other time when the Mackay Company's painters

were engaged in painting from the top of the said elevator or elevators, he did not exercise any supervision over the elevator operator or the said elevator; that whenever it happened that he desired to use the elevator for any purpose, for the George A. Fuller Company,
84 while the Mackay Company's painters were using it, he went to the said Mr. Minte, the foreman, and asked him if he could use it and he, Minte, would turn it over to him, the witness, and put his painters to doing something else, while he, the witness, was using the elevator; that he had an understanding with the said Minte that if at any time he, the witness, had any important work upstairs, for shaping up things, that he, the witness, could get the elevator; that while the Mackay Company's painters were at work on the said elevator, or using it for any purpose, he, as the superintendent of the aforesaid building, did not interfere with the operator or with the running of the said elevator; that the Mackay Company's painters started to work at half past seven on August 9, 1907 and worked about three hours before the accident occurred; that when the said foreman, Robert Minte, was not at the said building, he, the said Minte, left the signals to be given by one of his, Minte's men in the elevator shaft and the plaintiff, McCloskey, was the one who gave the signals; that he saw the plaintiff in this case at work in the said elevator shaft on three or four occasions previous to the day of the accident and had seen him on top of the cage of the said east elevator; that at the time of the accident he was not in the said building; that he knew the construction of the said east elevator and of the top of it especially and that a person could sit or ride on top of the aforesaid cross bars or stand on top of the same; that he had often ridden on top of the elevator in that position; that a person could stand on the
85 dome of the said elevator top and hold to the cable which supported the said elevator; that a person sitting or standing on the aforesaid cross bars would be at least a foot and a half away from the counterbalance weights at the east side of the said elevator; that he rode there often; and that he did not make any arrangement with anyone of the Otis Elevator Company relative to the elevators and the operators.

On cross-examination the witness testified that the elevator operator, the said Joseph Locke, did not report to him the number of hours he worked in the elevator but that the said operator reported his time to the Otis Elevator Company; that he did not know anything about the agreement between the George A. Fuller Company and the Robert E. Mackay Company relative to the said elevators; that all he knew was that the Robert E. Mackay Company used them and that the same equipment that hoisted material for the George A. Fuller Company, was used by the Robert E. Mackay Company for painting from the top of the elevator; and that at the time the said operator, Joseph Locke, was being used by the Robert E. Mackay Company, he exercised no control over the said operator; that when the said elevator operator was employed by the George A. Fuller Company then he had charge of him; that he did not direct the said operator to operate the elevator for anybody else; that that was done in the office; that he told the said Locke to obey the orders of Minte

and his painters while operating the said elevator and the order of the signals when the painters wanted to go up and come down; that the said Locke was told to observe the signals that might be given
86 to him, the said Locke; and how the painters wanted the elevator operated and that was what he meant, and that was the only control delegated to them; that Locke was standing where he could not see when they had finished their work; that they were on top and it was therefore necessary to signal him, the said Locke by some means, either to request him to go up and to stop or in some way let him know how they wanted the elevator operated.

Thereupon the witness was asked the following questions:

Q. Did you agree to operate it for any person or company other than the Mackay people while you had it hired from the Otis Elevator Company? A. Did we agree to hire it to anybody else?

Q. Yes; did you hire it to anybody else; did you contract to operate it for anybody else save the Robert E. Mackay Company during the time you had it from the Otis Elevator Company? A. I never made any contracts at all.

Q. Well, was it used by anybody else save the Mackay Company and yourself? A. Yes sir.

Q. By whom? A. The Bosford-Dickinson Company.

Q. On the same terms that you were operating it for the Mackay people? A. I don't know. I suppose so.

Q. At a dollar an hour? A. I don't know about that. That was done in the office.

87 Q. But as a matter of fact, you do know that the Fuller Company did operate for some one else other than the Mackay people, and that other party was whom?

Mr. COLBERT: Your Honor, we object to that. That assumes something that is not in the case. There is no evidence that they operated it for anybody.

The COURT: Oh, yes; he said they did operate it for Bosford-Dickinson, but he did not know the terms.

Mr. COLBERT: But the question is if the Fuller Company were operating for Bosford, Dickinson & Company, and therefore we object to assuming something that does not exist.

The COURT: I may have misunderstood the other answer. I think he said that they were operating it for the Mackay Company.

Mr. COLBERT: He said they were using it. Let the stenographer read what was said.

(The stenographer read as follows:)

"Q. Well, was it used by anybody else save the Mackay Company and yourselves? A. Yes sir.

"Q. By whom? A. The Bosford-Dickinson Company.

"Q. On the same terms that you were operating it for the Mackay people? A. I don't know, I suppose so.

"Q. At a dollar an hour? A. I don't know about that. That was done in the office.

"Q. But as a matter of fact, you do know that the Fuller
88 Company did operate for some one else other than the Mackay people, and that other party was whom?

Mr. COLBERT: I object to the pending question.
The COURT: Make it read: "Do you know."
(The question was repeated as follows:)

"Q. As a matter of fact do you know that the Fuller Company did operate it for some one else other than the Mackay people; and, if so, who was that other party." A. Yes sir, I know that.

By Mr. *DAYDEN*:

Q. What other people or persons or company was it being operated for by the Fuller people, other than its own company and the Mackay Company? A. I think the Bosford-Dickinson Company and the Mackay Company were the only ones.

Q. What did the Bosford-Dickinson Company do in the construction of that building; who were they? A. They had the woodwork. They supplied the doors and trimmings, and so forth.

Q. Can you think of any one else; were there other contractors there? A. I think they were the only two in the building when the elevator was in running order.

And the witness further testified:

That he never made any contracts; that he had ridden up on top of the said elevator, by standing on the aforesaid cross bars and holding to the cable and while in such position had carried up in
89 his arms six pieces of flooring; that he could have stood in the same position, holding on to the cable with one hand and could have held in the other hand the stippling brush and pot of paint, testified by the plaintiff, to have been carried up by him, the plaintiff. Immediately after the accident he started to get reports about it.

And thereupon the following questions were asked:

Q. If you had a pot of paint in one hand and a stippling brush in the other, kindly inform me how you would hold on to the cable? A. I think I would hold the stippling brush and the pot of paint in one hand.

Q. How large is the stippling brush? A. I don't know what size brush he was using.

Q. Is *it* a large brush, weighing 10 pounds, is it not? A. No sir.

Q. Is *it* a big brush, is it not? A. The one he had was for touching up, and I don't think it was a large brush.

Q. Would you have considered it much of a feat to have gone up there with those incumbrances? A. No.

On redirect examination the following question was propounded to the witness:

"Q. On the 9th of August, 1907, when you had turned that elevator and the operator over to the Mackay Company, state just what you said to Locke?"

To the answering of which question counsel for the plaintiff ob-

jected, and the Court sustained the objection, to which ruling
90 of the Court the counsel for the defendant, the George A. Fuller Company, duly excepted.

And on further redirect examination the witness testified that on the morning of the 9th of August, 1907, he told the said Locke, to act according to the way Mr. Minte directed him to and that he, the said Minte, was to have charge of him and give him, the said Locke, his instructions about the running of the elevator; that on that occasion he did not say anything to the said Locke regarding signals; that while the Robert E. Mackay Company was using the said elevator it had control of the operator, and was to give the signals, and the understanding that he, the witness, had with Mr. Minte, was that he, the said Minte, was to have the exclusive use of the said elevator; that on the morning of August 9, 1907, nothing was said between him and the said Joseph Locke, about signals; that he, the witness, knew nothing about any arrangement between the George A. Fuller Company and the Botsford-Dickinson Company regarding the use of the elevator and the operator prior to the day of the accident and simply knew the fact that the Botsford-Dickinson Company used the said elevator; and the witness further testified that he did not know whether the elevator equipment was turned over to the Botsford-Dickinson Company or whether the George A. Fuller Company was operating it for the Botsford-Dickinson Company.

The examination of said witness being concluded, PHILLIP F. GORMLEY was produced as a witness in behalf of the defendant, the George A. Fuller Company and testified that he was a con-
91 tractor in business for himself with the Gormley-Poynton Company; that on August 9, 1907, he was employed by the George A. Fuller Company as its general superintendent but that at the time of testifying in this cause he was not employed by the George A. Fuller Company in any capacity; that he did not make any arrangement with the Otis Elevator Company relative to the use of elevators in the Hibbs Building and did not know anything about the arrangement that existed between the two said Companies on August 9, 1907; that as to the said elevators on the said date there was no arrangement but there had been some arrangement relative to a temporary hoist or elevator when the George A. Fuller Company was hoisting building material and at that time the latter Company had an engineer to operate the elevator while the Otis Elevator Company had a man there looking after it to see that he controlled the appliances properly and the said Otis Elevator Company's man looked after the ropes, greased the machinery and saw that everything connected with the elevator was properly cared for; that he did not know of any arrangement between the George A. Fuller Company and the Robert E. Mackay Company as to the use of the aforesaid elevator at any time; that the elevator used under the arrangement with the Otis Elevator Company as a temporary hoist, at the time referred to by him, was a mere platform running in the regular passenger elevator shafts; that as general superintendent for the George A. Fuller Company, he supervised the con-

struction of the said Hibbs Building and knew that the Robert E. Mackay Company used the passenger elevators for hoisting
92 paints to the fifth floor of the said building where they stored their materials in a room and used the elevators for other work but that he did not know for what purpose the said painters were using the elevators on August 9, 1907, and it was not until after the occurrence of the accident to the plaintiff that he learned what such use was; the witness was thereupon asked the following questions:

"Q. Who was the operator in charge of those elevators? A. Locke.

"Q. In whose employ was he? A. In the employ of the Otis Elevator Company.

"Q. Who paid him? A. The Otis Elevator Company.

"Q. What authority or control did you or the George A. Fuller Company have over Mr. Locke? A. Not any.

"Q. What control or authority did you have over him on the 9th day of August, 1907? A. Not any.

"Q. Had you any right to discharge Mr. Locke? A. No sir.

"Q. Did you have any right under whatever arrangement existed between the George A. Fuller Company and the Otis Elevator Company to substitute some one else on that elevator for Mr. Locke? A. No sir.

And the witness further testified: that as general superintendent of the George A. Fuller Company he had charge of all of
93 their work in this city, including the said Hibbs Building and during the construction of the said building looked over the construction thereof five or six times a day from the time the building was started up to the time of its completion; and the witness further testified that he could not remember the exact date when the said building was turned over to the owner, under the George A. Fuller Company's contract.

No cross examination of the witness.

The examination of said witness being concluded, JAMES BAIRD was produced as a witness in behalf of the defendant, the George A. Fuller Company, and testified that he was the manager of the George A. Fuller Company, the defendant, and was employed as such on August 9, 1907; that the work of constructing the aforesaid Hibbs Building came under his control and he knew the contract entered into between Mr. Hibbs and the George A. Fuller Company, for the erection of the aforesaid building.

Thereupon, in order to prove the issues joined on its part in said case, the defendant, the George A. Fuller Company, introduced in evidence the original contract between the George A. Fuller Company and William B. Hibbs, dated September 22nd, 1906, for the construction of the aforesaid building.

The aforesaid contract was in writing and duly executed on the date aforesaid, by the George A. Fuller Company and the said William B. Hibbs and the terms thereof were in substance as follows:

That the George A. Fuller Company should provide all
94 the materials and perform all the work for the erection and completion of a ten story and basement, steel skeleton, fireproof office building on certain designated lots and parts of lots in Square 222, according to ground plan of the city of Washington, D. C., all as shown on the drawings and described in the specifications prepared by the Architects, which said specifications did not include the construction or installation of any of the elevators or elevator machinery for said building. The said William B. Hibbs by the said contract required the said George A. Fuller Company to complete the said building within ten months from the date of the aforesaid agreement, and agreed to give the said contractor possession of the building site not later than the aforesaid date of the contract. The sum paid by the terms of the said contract, for the erection of the said building, was the actual cost, to the George A. Fuller Company, of the work and materials required for the construction of the said building, plus eight (8) per cent thereof for the supervision of the construction by the said George A. Fuller Company, but it was further agreed that if the total cost of said work and materials and said eight (8) per cent additional should exceed a certain stipulated sum then the said George A. Fuller Company was to receive only the stipulated sum in full payment for all work, materials, and its supervision, subject to certain additions and deductions as provided for by the terms of the said contract. The George A. Fuller
95 Company was by said contract required to submit to the owner of the said building, vouchers for all expenditures including ten (10) per cent of the value of all large tools, machinery and derricks used in the construction of the said building, to compensate for wear and tear, while all small tools and the expense of keeping them in repair, less ten (10) per cent for wear and tear, was charged as part of the cost of said building but this provision did not apply to any property of sub-contractors of the George A. Fuller Company.

The said William B. Hibbs was to have access to the books of account and time sheets, in connection with the said building, for the purpose of verifying the account.

The George A. Fuller Company was required to deliver to the Architects, on or about the tenth of each month, a statement of all disbursements made for work and materials incorporated into the said building, together with vouchers for same, for audit. If found to be correct, the architects would, within five days, issue to the George A. Fuller Company a certificate for the sum of said vouchers and the owner was required to pay such certificate within seven days after receiving same.

It was further stipulated and understood that the plans and specifications excluded certain portions of the work which portions of the work were to be performed by the owner at proper time so as not to delay the general progress of the work.

96 No charge was to be made by the contractor, as part of the cost, for the services of any officers of the contractor, nor for

clerical services in any of its offices other than the temporary office on the building.

The deductions thereinbefore referred to were to be allowances for changes, while the additions so referred to were to be for extras.

And thereupon the witness further testified as follows:

Q. It has been testified in this case that there was some arrangement made between you and the Robert E. Mackay Company relative to the use of the elevators in that building for some purpose. Do you recall any conversation with Mr. Minte on that subject? A. I recall Mr. Minte coming up to see me about it, to arrange for the elevators.

Q. Please state what the conversation was? A. It was not much at length. As I recall, he called at my office and said he wanted to have the use of the elevators at times, and wanted to know how he could arrange it. I simply told him he could have the use of them under the customary arrangement; that whenever he wanted to use the elevators, if the Otis Elevator Company or ourselves were not using them, he could have the use of them for any purpose he might desire, and we would charge him the customary rate.

Q. What was that rate? A. I think we had rented the elevators to Mackay before at one dollar an hour, the customary rate.

97 Q. Was anything said between you and Mr. Minte on that occasion with relation to doing the work of hoisting the elevators up and down? A. Nothing whatever.

Q. What was the talk directed to? A. He simply came to me and asked for the use of the elevators, and I told him he could have it.

Q. Did that also include the operator? A. It included everything.

Q. That you were to lend the elevator and the operator to the Mackay Company? A. Yes; he had everything that went with the elevator.

Q. What were the charges made for the elevator, and to whom were they made, for lending that elevator and the operator? To whom were the charges made? A. To the Robert E. Mackay Company.

Q. What was the charge? A. One dollar per hour for all the time that he had the elevator in his use.

That the George A. Fuller Company did not know, at the time of the said arrangement with the foreman of the Robert E. Mackay Company what the Otis Elevator Company would charge for use of the elevator by the George A. Fuller Company and it was not until he received the Otis Company's bill or invoice that he had any idea thereof; that the Otis Elevator Company charged Three Dollars a day straight time and also included charges for repairs, grease, fuses and such things, as shown by the aforesaid invoice; thereupon the witness was asked the following question:

98 "Q. What became of the credit from the Mackay Com-
" pany to the Fuller Company of a Dollar per hour? A.
"It was credited to Mr. Hibbs."

To the answering of which counsel for the plaintiff objected. Counsel for the defendant, the George A. Fuller Company, ar-

gued that the question was asked for the purpose of showing what interest or control the George A. Fuller Company had in or about the said elevator or the operator at the time the Robert E. Mackay Company was using it; that it had been shown that the Otis Elevator Company paid the operator and counsel proposed to show that whatever was received from the Robert E. Mackay Company was credited to Mr. Hibbs and that the Fuller Company had no interest whatever in the matter. But the Court sustained the objection and thereupon counsel for the defendant, the George A. Fuller Company then and there excepted to the ruling of the Court.

And thereupon the witness further testified that he did not recall any arrangement with the Otis Elevator Company for the use of that car; that it is customary for the builder to use the car for the benefit of all desiring it; that he did not think there was any special arrangement made and that he was the only one to make any such arrangement; that there was no other conversation between him and the said Minte relative to the use of the said elevators by the Robert E. Mackay Company; that he had often seen the construction of the elevator which caused the accident and knew about the arrangement of the cross-bars on top of the said elevator
99 and that a person could sit on the said cross-bars very easily; that if a person sat close to the suspending cable, such person would be about two and a half or three feet from the counterbalance weights of said elevators and there were several places where one could sit on the said cross-bars and be far removed from the weights; that a person could stand on top of the dome and hold to the suspending cables connected with the said cross-bars; that he told the said Minte, when they arranged for the Robert E. Mackay Company to have the elevators, that while the George A. Fuller Company was charging the Robert E. Mackay Company for the said elevator, the latter Company was to have exclusive use of it and that he would not interfere with the Mackay Company's use of it without making his request for it in due time for Minte to dispose of his, Minte's men to other advantages; if the use of it at one o'clock in the afternoon was desired by the George A. Fuller Company notice thereof would be given to the said Minte sometime during the forenoon, but if the Otis Elevator Company wanted to use the elevator, it would have first call on the same at all times.

Upon cross examination the witness testified as follows:

"Q. Now, they borrowed that elevator, its service and its operator, " for a dollar an hour? A. The arrangement was just as I tried to " outline it in my testimony.

"Q. Answer my question. Is that so? They were paying a " dollar an hour? A. They paid a dollar an hour.

"Q. And they were borrowing it, and you were lending it?
100 " A. I don't know whether you could say they were borrow- " ing it. They were renting it. They were paying for it.

The examination of said witness being concluded, JOSEPH P. LOCKE, was produced as a witness in behalf of the defendant, the George A. Fuller Company, and testified that he was the operator

who was running the elevator in question on August 9, 1907 and he was on said date employed by the defendant, the Otis Elevator Company and had been in their employ continuously for about five months prior to said date; that his said employment with the Otis Elevator Company continued for about four months after the said date; that at the time of testifying in this cause, he was employed at the Munsey Building by the Washington Times; that prior to the date of the accident the painters had been painting the elevator shafts and had continued that operation a number of times going up and down in the shafts; that on the morning of August 9th, at the time of beginning work, that was, 7:30 A. M., he was told that the painters would use the elevators that day, as they had done before that date, and he began his operations as he had done previously by throwing in the switch and getting ready; that about twenty minutes after 7:30 A. M., the painters started to work, painting the east shaft, and they continued that operation a number of times, going up and down in the shaft a number of times; that finally the elevator, with the painters, including the plaintiff, on top thereof, reached the bottom of the shaft and he presumed they were painting and were ready to go up again; that he had, during all
101 of these operations, in the painting of the said east shaft on the day aforesaid, been receiving his orders from the plaintiff, who was on top of the elevator in question, working with the other painter; that when the elevator was at the bottom of the shaft as aforesaid, he called to the plaintiff who said to him "We are ready to go up." and he asked the plaintiff if he was ready and the plaintiff replied "Yes I am."; that he then said to the plaintiff "Look out for the weights.", and the plaintiff replied "All right."; that before moving the car, he called to the painters a second time saying "Mac, be careful of the weights." and the said plaintiff replied, "I am all right. Go ahead." which he then did; that he then started the elevator on the first speed, which was its slowest speed, and proceeded up, the trip being continued until the elevator came to a stand still, caused by the weights striking the plaintiff's foot; that he then jumped out of the car, went into the basement where the machinery was installed, and operating the elevator from there lowered the same, which raised the counterbalance weights and released the plaintiff's heel; that the elevator was, by an automatic device known as the slack cable devise, stopped immediately upon the weights coming in contact with the plaintiff's heel; that the counterbalance weights comprised an upper and a lower set with an open space of eight inches there-between and it was in this space and about midway of the weights, that the plaintiff's heel was caught, as he observed before he released it; that neither the plaintiff nor the other painter, Mr. Renner, ordered him to stop
102 at the second floor; that on the day aforesaid, the plaintiff had been giving all orders or directions to him and that if he had been directed by the plaintiff to stop at the second floor, there was no reason why he could not have done so; that when he jumped out of the elevator to see what had stopped it, and observed the accident to the plaintiff, the latter did not then make any com-

plaint about his operation of the elevator, neither did the plaintiff say anything about the elevator not stopping at the second floor; that he observed McCloskey's position on top of the elevator while his heel was caught by the weight and saw that his right foot was on the flat rim at right angles to the weight and that his body was leaning towards the center of the top with his hands resting on the cross bars; that always while the said elevator was used by the Robert E. Mackay Company's painters he operated it on the first speed; that between half past seven a. m. and the time that the accident occurred on August 9, 1907, he received all of his orders from the plaintiff and that the said orders included the moving of the elevator up and down as a movable stage and everything else pertaining to the painting of the said elevator shaft; that in the doing of that work for the Robert E. Mackay Company neither the said Mr. Fisher superintendent of the building for the George A. Fuller Company, nor its general superintendent, the aforesaid Mr. Gormley, attempted to interfere with him in any manner; that in moving the said elevator up and down in its shaft, he would stop it at different places to permit the painters to touch up spots,
103 upon order from them; that on this last mentioned trip going up, just before the accident, he was not directed to stop at any floor; and the witness further testified that he never told the plaintiff that he was paid and employed by the George A. Fuller Company; and the witness further testified that on the last trip after placing the lever at the first speed notch, he held it there with his hand all the time and there was never any pause in the movement of the elevator until it was stopped by McCloskey's foot.

Upon cross examination the witness testified that during the time that the plaintiff was at work on the said elevator, witness obeyed the plaintiff's signals as to starting and stopping and the plaintiff exercised that control over him; that on the morning of the accident, if he remembered right, he began at the bottom of the shaft, with the painters, and worked with them up and down in the said shaft a number of times, stopping as they indicated; that on the last trip of the elevator, prior to the accident, the painters did not order him to stop at any particular place and he understood that they were going to repeat the operation, as they had done before, which was going over the shaft and touching up the spots; that he was authorized to obey any orders given to him, by the Robert E. Mackay Company's painter foreman, who in this instance was the plaintiff; that he did not take orders from the plaintiff, except those relating to the running of the elevator; that at the time of the accident there were two passengers in the said elevator
104 but that they did not say which floor they wished to go to, that the plaintiff, Mr. McCloskey, told him that he could carry the said passengers in the elevator after he first asked if he should do so; that this permission was given to him at the first floor just before the elevator was started up on the last trip as aforesaid; that he told the plaintiff then that there was a couple who wanted to go up as we went and he said to the plaintiff, "Can they go?" to which the plaintiff replied, "Yes."

On redirect examination the witness testified that McCloskey, while the aforesaid conversation was carried on, was standing in the same place as when said McCloskey met with the accident, because he the witness was standing in the door—the door sill and he could see McCloskey while talking to him.

On recross-examination the witness testified that he did not know where McCloskey was standing when struck by the first weight.

On further re-direct the witness testified that he knew where the plaintiff was standing when his foot was caught, because he found it fastened when he went up there, but he could not say that McCloskey had not changed his position after the aforesaid conversation, and before his foot was caught by the weights.

The examination of said witness being concluded the aforesaid RAMSEY W. SCOTT was produced as a witness in behalf of the de-
fendant, the George A. Fuller Company and testified that he
105 was acquainted with the construction of the aforesaid elevator
in the Hibbs Building and that a man could stand or sit upon the aforesaid cross-bars on top of the aforesaid elevator and keep out of contact with the aforesaid counterbalance weights and that a person could, in such positions hold to the cables from which the elevator was suspended; that he had stood upon the aforesaid cross-bars on one occasion when he inspected the rails; that it would be nearly impossible for a person, standing on the aforesaid cross-bars and holding on to the aforesaid cables, to come near enough to the aforesaid counterbalance weights to permit such person's feet to be struck by the said weights; that a person could stand on top of the dome of said elevator and hold to the said cable and ride there without coming in proximity to the said weights; that a person could stand on the other set of cross-bars, which were arranged diagonally of the first mentioned set of cross-bars, without being in proximity to the weights; that a person could also stand on any of the other three sides of the said elevator, on the flat rim of the top of said elevator, where there were no weights at all adjacent, and thereby could have avoided contact with the said weights.

On cross examination the witness testified that it would not have been safe to ride on the top of the car, in approaching the top floor unless the elevator operator was cautioned to slow down and stop it before the grating at the top of the shaft was reached; that if such caution was given to the operator it was comparatively safe to stand or to work, on the aforesaid cross bars; and the witness testi-
fied that in riding on top of the elevator and on the afore-
106 said cross-bars or the other diagonal set of cross-bars, termed
by him the cross-head, with a stippling brush and a pot of paint, a person should have one hand disengaged and with the other hand hold to the aforesaid cables.

The examination of said witness being concluded, Dr. FRANK LEECH was produced as a witness in behalf of the defendant, the George A. Fuller Company, and testified that he had examined the plaintiff and found that the tendon Achillis had been injured about four and half inches above the sole of the heel; that the fracture of the heel bone had perfectly united and that there was no evidence of any other injury and there was no evidence of the fracture in the heel bone; that from the character of the scar on the said tendon the plaintiff's foot must necessarily have been at a right angle to the weights when the heel was caught thereby; and the witness further testified that it would be impossible for a man standing with his right foot in the position, claimed by the plaintiff, to receive the injury which the plaintiff received and that the weights could not have produced such an injury if they had hit the side of the plaintiff's foot.

Upon cross examination the witness testified that the plaintiff must have attempted to turn around in order to get his foot caught in the manner described by the witness Joseph P. Locke. He did not know that he was thrown around; at any rate his foot got around that way.

The examination of said witness being concluded, Dr. JOHN R. WELLINGTON was produced as a witness in behalf of the de-
107 fendant the George A. Fuller Company, and testified that he was a physician and surgeon and that his practice was confined to surgery altogether and that he was the surgeon for the Casualty Hospital and for the Children's Hospital and one of the surgeons for the George Washington Hospital, and that he was also clinical professor of surgery at George Washington Hospital; that from the character of the injury received by the plaintiff and the location and character of the scar produced by the wound as described in an hypothetical question propounded to him that it would have been absolutely necessary for the weight to have hit the plaintiff's heel perfectly square and at right angles to the foot in order to have produced such an injury to the Tendo Achillis and that if the said tendon had been hit from the side, he did not believe it would have been possible to have crushed the tendon, without crushing the whole foot, because the said tendon is very strong, very thick and powerful.

Upon cross examination the witness testified that if the plaintiff had been standing in the position testified to by him, the plaintiff, and had been thrown off his balance, still his heel must have been at right angles to the weight, when struck, in order to have produced the injury described; and that his foot, when it was finally caught, must have been at a right angle to the said weight. I don't know how he got there.

And thereupon, the defendant, the George A. Fuller Company, rested its case.

108 And thereupon the plaintiff was recalled as a witness, in his own behalf, in rebuttal, and he testified that on the morning he was injured he did not have any conversation with the elevator operator, agreeing that the operator should carry a passenger or passengers and that nothing was said in that respect between the witness Renner and the said operator, or between him and the operator.

There was no cross examination of the witness.

The examination of said witness being concluded, the plaintiff recalled as a witness in rebuttal, NEWTON D. RENNER, who testified that he did not remember anybody telling the elevator operator that he could carry passengers on the trip which resulted in the injury to the plaintiff and that he did not remember any such conversation.

And thereupon the plaintiff rested his case.

And thereupon, upon all the evidence hereinbefore set out, which is hereby referred to and made a part hereof, and which was all the evidence in the case, the plaintiff, by its counsel, prayed the Court to instruct the jury as follows:

1. The jury are instructed as matter of law that upon all the evidence in the case, the elevator operator, Lock, at the time of the happening of the injury to the plaintiff, must be considered to have been the servant of the defendant, the George A. Fuller Company.

(Granted & Exc.)

2. The jury are instructed that if they find from the evidence that the plaintiff, Wilson A. McCloskey, while being carried

109 on the top of the elevator in the Hibbs Building, in connection with the performance of his duties in painting the shaft of said elevator, as an employee of the Robert E. Mackay Company, was injured through the negligence of the elevator operator in neglecting to obey his signals in the manner described in [declaration]*

the ∧ *plaintiff's evidence* and that the happening of said injury was not contributed to by negligence or want of proper care on the part of the plaintiff, their verdict should be for the plaintiff.

(Amended and granted.)

(Exception.)

3. If the jury find for the plaintiff, they are to consider, in estimating the damages, the injuries to the plaintiff Wilson A. McCloskey and the damages resulting therefrom to him.

They are to take into consideration the suffering including bodily pain, in consequence of such injuries, and also the mental suffering and pain attendant upon and the natural incident of such bodily suffering, the character and extent of his physical disabilities, and whether the injury is permanent or otherwise.

(Conceded.)

[* Words enclosed in brackets erased in copy.]

The court granted the first prayer and also the second prayer as amended. The third prayer offered by counsel for the plaintiff was conceded. To the granting of the first and second prayers, so offered by counsel for the plaintiff, by the Court, counsel
110 for the defendant, the George A. Fuller Company, then and there separately and severally excepted.

And the counsel for the defendant, the George A. Fuller Company prayed the court to instruct the jury as follows:

At Law. No. 50782.

McCLOSKEY
v.
GEORGE A. FULLER CO. et al.

1. The Jury are instructed that under the pleadings and all the evidence, their verdict should be for the defendant, the George A. Fuller Company.

(Refused and Exc.)

2. The Jury are instructed that if they find from all the evidence that the accident to the plaintiff complained of was occasioned in any degree by his own carelessness, the verdict should be for the defendant, the George A. Fuller Company, regardless of whether the elevator operator was negligent or not, or whether he was the servant of the Fuller Company or not.

(Conceded.)

3. If the Jury find from all the evidence that the accident to the plaintiff was occasioned wholly or in part by reason of the fact that he had placed himself in an exposed and dangerous position on *the ledge around* the top of the elevator car, *with reference to obeying the signals to stop at the second floor, if you find such*
111 *signals were given* when he might readily have placed himself in a safe and secure position, the verdict should be for the defendant the George A. Fuller Company, regardless of any supposed negligence on the part of the elevator operator and regardless of whether the operator was a servant of the Fuller Company or not.

(Conceded as Amended.)

(Refused as asked & Exc.)

(The parts underscored were added by way of amendment.)

4. If the jury find from all the evidence that at the time of the accident to the plaintiff complained of, the elevator operator whose alleged negligence caused the injury to the plaintiff, was employed and paid by the Otis Elevator Company, which Company hired or loaned the elevator with its equipment and power to run it, together with the operator himself, to the Fuller Company for that Company's purposes, and if they further find that the Fuller Company in turn entered into a contract with the Mackay Company by which the latter agreed to do all the painting in the Hibbs Building, including the elevator shaft, and to supply all the labor and materials necessary therefor, and that the Fuller Company agreed with the Mackay

Company to turn over to the latter the elevator with its power and equipment and the operator to run it with the understanding that while the elevator and the operator were being used for the purposes of the Mackay Company's work, said Mackay Company should
112 have the exclusive control and direction of the movements of said elevator and the operator himself, and that while engaged in doing the Mackay Company's work, the operator negligently caused the injury complained of, then said operator for the time being was the servant of the Mackay Company and not of the Fuller Company, and the verdict should be for the defendant the Fuller Company.

(Rejected & Exc.)

5. If the Jury find from all the evidence that the Mackay Company had the contract for doing the painting work in the Hibbs Building under an agreement with the Fuller Company, including the painting of the elevator shaft, which work required the construction of a stationary or swinging scaffold, or the use of the elevator, and if the jury further find that the Mackay Company for reasons satisfactory to it preferred to procure and did procure from the Fuller Company the use of the elevator and an operator to run it, and that while engaged in doing the Mackay Company's work, the operator was placed under the exclusive control of the Mackay Company, then said operator became for the time being the servant of the Mackay Company, and the verdict should be for the defendant.

(Rejected & Exc.)

6. The jury are instructed that the fact that the plaintiff was injured, no matter how seriously *in itself* does not entitle him to recover in this action, but before a verdict in any amount can be rendered in his favor, the jury must find that the elevator operator
113 was at the time of the accident guilty of some negligence, and did not act as a reasonably prudent man should have acted under all the circumstances, [and that as defined in previous instructions said operator was the servant of the Fuller Company while performing the acts which occasioned the accident.]*

(Refused as asked & Exc.)

(Conceded as Modified.)

(The language struck through, appeared in the prayer as originally presented. The part added by way of amendment is underlined.)

7. The Jury are instructed that in considering the question as to whose servant Locke, the elevator operator, was at the time of the accident, they may take into account, along with all the other evidence in the case, the fact that the Fuller Company did not employ and did not pay Locke for his services, and had no power to discharge him, and also the fact that at the time of the accident, the Otis Elevator Company had not turned the elevator over to the owner of the building.

(Rejected & Exc.)

[* Words enclosed in brackets erased in copy.]

8. The Jury are instructed that there can be no recovery in this case on the ground of the total disability of the plaintiff to perform manual labor, if they are satisfied from all the evidence that the plaintiff is able to perform manual labor to some extent, and in this respect the recovery must be limited to the diminution of the plaintiff's ability to do manual work, and such other elements of damage as the plaintiff may be entitled to recover.

(Conceded.)

114 9. The Jury are instructed that if upon consideration of all the evidence and the instructions given by the Court, the jury should come to the conclusion that the plaintiff is entitled to a verdict, then in estimating the amount of the damages they should not be guided or influenced in the slightest degree by the fact that the plaintiff is an individual who has been injured, and that the defendant is a corporation financially able to respond to a verdict that may be rendered against it, but they should in all respects treat the defendant, the Fuller Company, precisely as if it were an individual, without being influenced by any prejudice against the defendant corporation or by any feeling of sympathy of the plaintiff on account of his injuries.

(Conceded.)

The second, eighth and ninth prayers, so offered by said counsel for the defendant, the George A. Fuller Company, were conceded and the Court granted the said prayers, but the Court refused to grant the first, third, fourth, fifth, sixth and seventh prayers so offered by said counsel for the said defendant, to which refusal of the Court to grant each of said prayers specified, counsel for the said defendant, then and there separately and severally excepted. The Court granted the said defendant's third and sixth prayers as modified or amended and conceded.

And thereupon the Court instructed the jury as follows:

115 Gentlemen of the Jury, in this case the plaintiff alleges that he has been injured, and that the injury was occasioned by the defendant in the case, as they originally were, including the defendant, the Otis Elevator Company. Now, it is not necessary for you to dwell upon the question of the Otis Elevator Company at all, because the Court has decided that the Otis Elevator Company was not responsible for the injury, and your verdict was rendered for that Company under the instructions of the Court. So the only question before you is as to whether or not the injury complained of in this declaration was occasioned by the defendant company, that is to say, the Fuller Company. That is the question before you. The Otis Elevator Company is not here, and you have nothing to do with it.

Now, there is another question that has developed, according to the Court's view, and that is the question as to the status of the witness Locke. Was he an employee or servant of the Fuller Company or of the Mackay Company? If he was a servant of the Mackay Company, then this plaintiff can not recover in this case. So it becomes necessary to decide the question as to whether or not he was the servant of the Fuller Company.

Now, the Court has decided—and its decision is final, so far as you are concerned, there being the opportunity and the right of the parties to correct the Court's findings by a higher Court, if this Court should be in error on that subject—and I have granted a prayer that says to you that so far as this case is concerned now, all
116 the testimony in the case on both sides seeming to agree on the given point, that the witness Locke was the servant of the Fuller Company. Therefore that question of law has been eliminated, and you have no concern with it. It therefore follows that the only question with which you are concerned is the one question, has the defendant company, that is, the Fuller Company, been guilty of negligence, and was this negligence the cause of the plaintiff's injury, and, if it was, what is the estimate which you place by way of damages upon that injury?

Keeping in mind always that the law says no matter how negligent the defendant may be, no matter how negligent you may find the defendant, the Fuller Company, to have been in this case, still if you find the plaintiff was negligent in any degree that contributed to the injuries, then if he was responsible entirely for his own injury, or if he was in part responsible for his own injuries, the Court does not undertake to measure the difference of the amount of negligence, but it simply says that even if the defendant was negligent and the plaintiff contributed in some degree to his injury by his own negligence, he can not recover.

That, generally speaking, is the law of this case and of all cases of this character.

Unfortunately, something has been said in this case in the argument, brought about by the heat of argument, with which you have no concern. Very often counsel say some things that they ought not to say. This is very frequently not intentional, but they are
117 carried away by their case. So in this case counsel for the plaintiff has undertaken to remark upon the position of the defendant in this case as a corporation, and so on.

Now, you have nothing to do with that. You have been sworn in this case to try the question of the right of recovery or not of this plaintiff, purely upon the evidence of the case. You are sworn to try it according to the law and the evidence, and you are utterly unconcerned by reason of the personality of the parties in this case. It makes no difference to you whether the plaintiff in the case is a poor man or a rich man. That is not your concern. You only know him as the plaintiff, and whether he be rich or poor is no concern of yours. Likewise as to the defendant there is nothing in this case to indicate that the defendant is rich or poor, and it does not make any difference. You have no concern with that. You treat the plaintiff as A. and you treat the defendant as B. You stand absolutely indifferent as to either of them. The only question you have to decide is, is the plaintiff entitled to recover under the evidence or not, irrespective of the plaintiff's position or of the defendant's position.

So, gentlemen, you see, the verdict of the jury is, in itself, a serious matter. You are trying the issue between men, and are not con-

cerned with their status one way or the other. The whole hope of our courts is that the juries shall do justice between man and man without any respect whatever to the personality of the parties; and I am sure you will do it, as I am glad to say most juries do
118 in this jurisdiction.

Then what is the complaint? The plaintiff charges that he has been injured, as I have already said, by the negligence of the defendant company, through its servant or employee, Locke.

In every case that comes into our courts, the plaintiff has a given duty, and that is that when he charges negligence he must prove negligence; so that the burden of proof in this case is upon the plaintiff to show, by the fair weight of testimony, that Locke, and therefore the defendant company, was guilty of negligence. So when you go to weigh the testimony in this case, you must remember that the burden is upon the plaintiff to establish the negligence of the defendant company; and you understand if you establish Locke's negligence, you establish the negligence of the defendant company. I only say that to keep your minds clear, when I say the negligence of the defendant.

The burden, therefore, is upon the plaintiff in this cause to show, by the fair weight of testimony, that the defendant company was negligent, and that he was injured by reason of that negligence. When I say by the preponderance of evidence, or by the fair weight of evidence, it simply means that when you go to consider the question as to which side has offered the greater weight of evidence, you simply measure it and weigh it, and if from all the evidence you find that the plaintiff's evidence of this negligence weighs
119 more, to your minds, than the testimony of the defendant, then the plaintiff is entitled to recover. If the evidence of the defendant weighs more than the testimony of the plaintiff, then of course you would have to find for the defendant; but suppose that they both weigh the same and you could not tell which side offered the greater weight of evidence. Now, the plaintiff must offer the preponderance of evidence. Its testimony must weigh more than the testimony of the defendant. Consequently, if it weighs just the same, then your verdict would have to be for the defendant, because the plaintiff's testimony must weigh more.

So, on the other hand, if the question of contributory negligence comes up, that is a defense, and then the defendant, if it sets up contributory negligence, must prove in the same way, by the fair weight of testimony, that the plaintiff contributed to his own injury by his own negligence. If he contributed in any degree to the accident, then the plaintiff can not recover, and your verdict would have to be for the defendant.

You therefore see what your plain duty is. It is to carefully weigh the evidence in the cause, and discover whether the plaintiff has proven his case by the fair weight of evidence. After you have settled that question, then you have to go a step further.

I should say, first, before I come to that phase of it, that in con-

sidering this question of the negligence, it is your duty to consider the position of the plaintiff, as to whether or not, considering the position where he stood on that car, in reference to the fact that
120 he was going to the second story only, if you believe from the evidence that that is where he had been ordered to go, whether he occupied such a position as would be reasonably safe under all the circumstances of the case, taking into consideration the fact, if you believe it to be the fact, that he was to be taken to the second story of the building.

All of these questions, therefore, enter into the case. You have no right, under the law, to take into consideration the fact that an accident happened. The happening of an accident does not justify a verdict at your hands, because that is not the question. The question is, did the accident happen by reason of the negligence of the defendant. So the happening of the accident amounts to nothing, unless you connect it with the fact that it was through the negligence of the defendant company that the accident happened.

So you see all of these things work together. You must draw no conclusoon from the mere fact of the happening of the accident itself, but you must draw your conclusions that the accident happened by reason of the negligence of the defendant before you can find for the plaintiff.

In that connection I do not know whether it is necessary to read the prayers or not.

Mr. COLBERT: I think not, sir.

The COURT: You are therefore instructed, as a general proposition—and I have embodied in what I have said to you nearly all the prayers, or at least the principles involved in the prayers—
121 that if you find from the evidence in this cause that the plaintiff was injured by reason of the negligence of the defendant company, and if his own negligence did not contribute to any part of it, then the plaintiff in this case is entitled to recover, and your verdict would be for the plaintiff.

On the other hand, if you find that it was not caused by the negligence of the defendant company, or was caused by the negligence of the defendant company and the plaintiff together, then the defendant is entitled to a verdict.

If you find for the defendant, that is the end of the case, and you have to go no further.

If, on the other hand, you find for the plaintiff, then you must go a step further, and you have then to consider what damages he is entitled to by reason of the negligence of the defendant company.

So in taking that into consideration, if you find for the plaintiff, as I have said, you are to take into consideration the suffering, including bodily pain in consequence of such injuries, and also the mental suffering and pain attendant upon and the natural incident of such bodily suffering, the character and extent of his physical disabilities, and whether the injury is permanent or otherwise.

You are entitled to take into consideration all these things—bodily

suffering, pain, whether that injury is permanent or not. All
122 of those things are matters which you are entitled to take into consideration in estimating the damages incident to the negligence, and the injury caused by it.

Mr. COLBERT: Will your Honor read our 8th prayer in that connection, which your Honor has granted, I think?

The COURT: Yes.

"The jury are instructed that there can be no recovery in this case on the ground of the total disability of the plaintiff to perform manual labor, if they are satisfied from all the evidence that the plaintiff is able to perform manual labor to some extent, and in this respect the recovery must be limited to the diminution of the plaintiff's ability to do manual work, and such other elements of damage as the plaintiff may be entitled to recover."

In other words, reading the two prayers, if the jury finds for the plaintiff, they are to consider, in estimating the damages, the injuries to the plaintiff, Wilson A. McCloskey, and the damages resulting therefrom to him. They are to take into consideration the suffering, including bodily pain, in consequence of such injuries, and also the mental suffering and pain attendant upon and the natural incident of such bodily suffering, the character and extent of his physical disability, and whether the injury is permanent or otherwise.

You take that into consideration. You are not entitled to allow this plaintiff for total disability unless you find it was total; but you can only allow him damages, if you find for the plaintiff, for the diminution in his ability to do manual work. You are
123 entitled to allow him for mental suffering which you may find incident to the bodily suffering.

So, gentlemen, if you find for the plaintiff in this case you must go a step further. You must all agree, of course, and you will select some one of your body to act as foreman for you, who will announce your verdict. If you find for the defendant, when you are asked, you will simply say "For the defendant." If you find for the plaintiff, you will say, "We find for the plaintiff," and then state how much you find for the plaintiff.

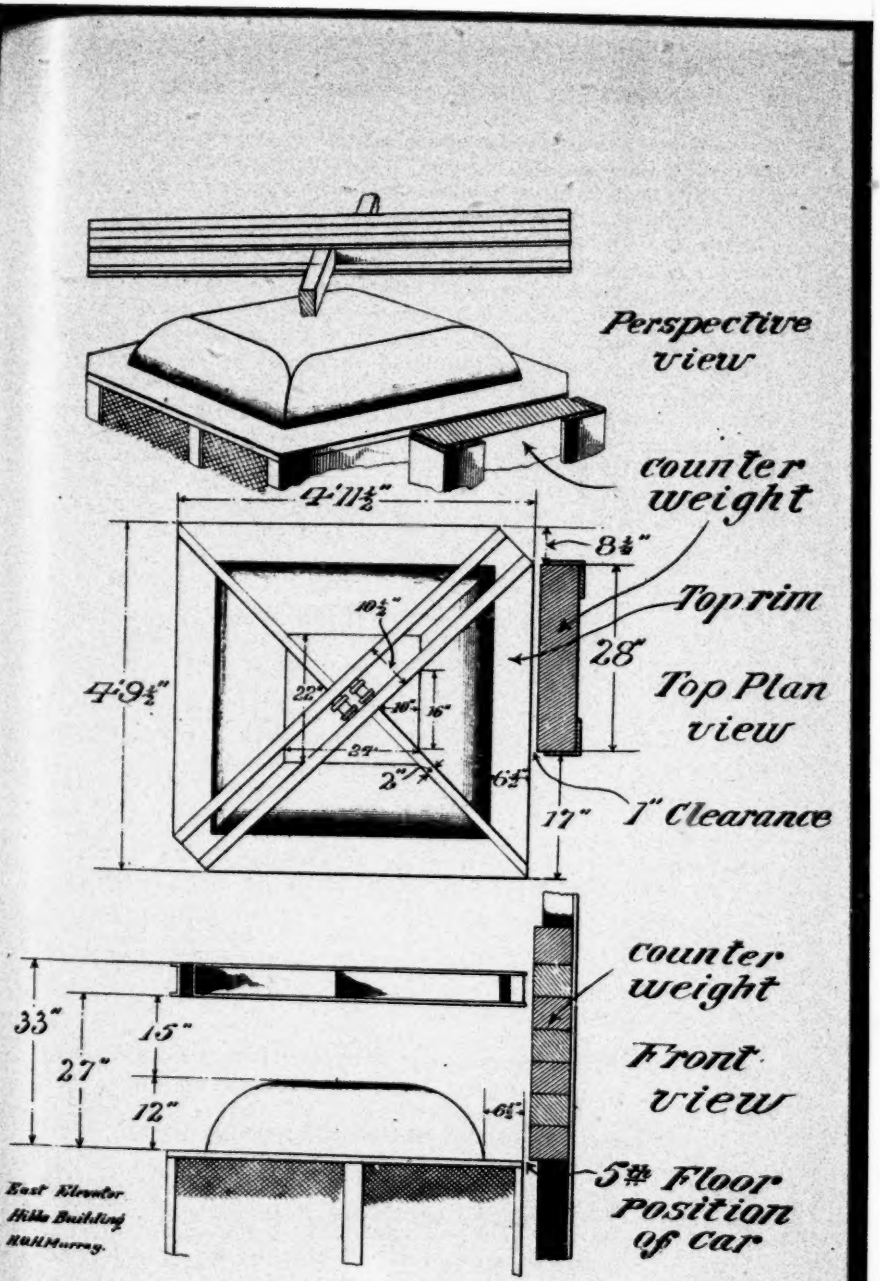
Thereupon counsel for the said defendant, after the deliverance of the oral charge of the Court to the jury, renewed each and all of their exceptions to the granting by the Court of the prayers of the plaintiff and to the refusal of the Court to grant each of the prayers heretofore specified offered by and on behalf of the said defendant, which exceptions were then and there noted upon the minutes of the Court.

Thereupon counsel for the said defendant interposed an objection to the oral charge of the Court as follows:

"Mr. COLBERT: We desire to renew our exception to that portion of the charge which again finds that Locke was an employé of the Fuller Company. In other respects the charge is satisfactory to us.

"The COURT: You may retire, gentlemen."

But the Court adhered to his instructions to the jury and refused


Perspective view
counter weight
4'11½"
8¼"
Top rim
28"
4'9½"
Top Plan view
10½"
22"
16"
15"
34"
2"
6½"
17"
1" Clearance
counter weight
33"
15"
27"
12"
Front view
6½"
5th Floor
Position of Car
East Elevator
Hills Building
H.H.Murray.

to withdraw, alter or modify the same, to which action of the Court the said defendant, by its counsel, then and there duly ex-
124 cepted and said exceptions were noted at the time upon the minutes of the Court.

After the noting of said exceptions hereinbefore set forth, and the making the same a part of the record, which is also made a part hereof, and because the matters and things hereinbefore recited are not matters of record, and in order that the said defendant may have its case reviewed on appeal by the proper court, the defendant, the George A. Fuller Company, by its attorney moves the Court to sign and seal this, its Bill of Exceptions, to have the same force and effect as if each and every one of said exceptions had been separately signed and sealed, which motion is by the Court granted; and thereupon the said defendant tenders this, its Bill of Exceptions, and requests the Court to sign and seal the same according to the statute in such cases made and provided and it is accordingly done, now, for then, this 24th day of February A. D. 1910.

HARRY M. CLABAUGH,
Chief Justice.

[SEAL.]

Settled by consent
E. S. DUVAL, JR.,
M. J. COLBERT,
For Def't Fuller Co.
S. V. HAYDEN,
HAYDEN JOHNSON,
For Plaintiff.

Memorandum.

February 25, 1910.—Time to file transcript of record extended from time to time to and including April 15th, 1910.

(Here follows plan of elevator, marked page 125.)

126 *Directions to Clerk for Preparation of Transcript of Record.*

Filed February 25, 1910.

In the Supreme Court of the District of Columbia.

At Law. No. 50782.

WILSON MCCLOSKEY, Plaintiff,
v.
GEORGE A. FULLER COMPANY and THE OTIS ELEVATOR COMPANY, Defendants.

The Clerk of said Court will please prepare a transcript of the record on appeal, for the Court of Appeals, in the above entitled cause, to include the below mentioned items, namely:

Declaration Filed July 18, 1908.
Pleas Filed July 28, 1908.
Joinder of Issue Filed August 11, 1908.
Leave to Amend Decl. etc. Filed November 20, 1908.
Verdict for Def't Otis Elev. Co. Filed October 13, 1909.
Verdict for Pl'ff vs. Def't George A. Fuller Co. October 19, 1909.
Judg't for Def't Otis Elev. Co. October 20, 1909.
Judg't for Pl'ff vs. Geo. A. Fuller Co., Appeal etc., October 29, 1909.
MEMO.—Appeal Bond filed November 1, 1909.
MEMO.—Bill of Exceptions submitted December 13, 1909.
MEMO.—Time to File transcript of record extended to Jan. 15, 1910 December 13, 1909.
127 MEMO.—Time to file Transcript of Record extended to Feb. 15, 1910 January 14, 1910.
MEMO.—Time to file Transcript of Record extended to Mar. 15, 1910 January 31, 1910.
Order making Bill of Exceptions of Record February 24, 1910.
Bill of Exceptions filed February 24, 1910.
This designation filed February 25, 1910.

EDWARD S. DUVALL, JR.,
M. J. COLBERT,
Attorneys for Def't George A. Fuller Company.

Memorandum.

April 11, 1910.—Time to file transcript of record further extended to and including April 20th, 1910.

128 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 127, both inclusive, to be a true and correct transcript according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 50782 at Law, wherein Wilson A. Mc. Closkey is Plaintiff and George A. Fuller Company is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 18th day of April, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No 2153. George A. Fuller Company, Appellant, vs. Wilson A. McCloskey. Court of Appeals, District of Columbia. Filed Apr. 18, 1910. Henry W. Hodges, clerk.

No. 2153.

GEORGE A. FULLER COMPANY, Appellant,
vs.
WILSON A. MCCLOSKEY.

WEDNESDAY, *October 19th, A. D.* 1910.

The argument in the above entitled cause was commenced by Mr. E. S. Duvall, Jr., attorney for the appellant, and was continued by Messrs. Hayden Johnson and S. V. Hayden, attorneys for the appellee, and was concluded by Mr. M. J. Colbert, attorney for the appellant.

In the Court of Appeals of the District of Columbia.

No. 2153.

GEORGE A. FULLER COMPANY, Appellant,
vs.
WILSON A. MCCLOSKEY, Appellee.

Opinion.

(Mr. Justice ROBB delivered the opinion of the Court:)

By this appeal the appellant, who was one of the two defendants below, and who will be designated as defendant here, seeks a reversal of the judgment of the Supreme Court of the District of Columbia upon a verdict in favor of appellee, plaintiff below, in an action for the recovery of damages occasioned by the alleged negligence of the defendant's elevator operator in failing to stop the elevator, on which the plaintiff was riding, as directed by plaintiff.

The defendant company contracted with William B. Hibbs to erect for him an office building on 15th Street in this city. The work was to be completed by a time certain. This contract did not include the installation of an elevator. That work was provided for in a contract between Hibbs and the Otis Elevator Company. The elevator company installed its elevator long before the completion of the building. This elevator, down to the time of the injury to the plaintiff, had not been turned over to the owner of the building, but was operated by an employee of the Otis Company, who was paid and generally controlled by that company. After its installation the defendant company entered into an arrangement with the elevator company by which it became entitled to use this elevator in the prosecution of its work, paying to the elevator company three dollars per day, which was to cover the wages of the caretaker or operator aforesaid, the Otis Company reserving the primary right to use the elevator. Under this arrangement the defendant company was to have no control over the elevator operator other than to notify him when to start and when to stop his machine.

The defendant company entered into a sub contract with the Robert E. Mackay Company of New York for the painting required by its contract with Mr. Hibbs. The plaintiff was an employee of the Mackay Company. The elevator shaft was included in this sub contract. To paint this it was of course necessary that some means be provided whereby workmen could ascend and descend the shaft. Therefore the Mackay Company entered into an agreement with the defendant company by which the defendant company agreed to furnish the Mackay Company, for use in painting said shaft elevator, power and operator at any time that the elevator company or the defendant company did not want them. Nothing whatever was said about the arrangement between the elevator company and the defendant company, the agreement between the Mackay and the defendant company proceeding upon the theory that the equipment and elevator were under the control of the defendant company. The Mackay Company was not to have, and in fact did not have, any control over the operator other than to direct him when to start and when to stop his elevator while thus temporarily used as a movable staging.

Upon the day of the accident plaintiff and another workman were on the roof of the elevator touching up the walls of the shaft. They had worked down until the floor of the car was on a level with the first floor of the building. To finish the walls of the shaft between the first and second floors of the building, the space then occupied by the body of the car, it became necessary to get under the car. To do this it was necessary for the painters to be taken to the next or second floor landing. The plaintiff was standing on the rim or ledge around the top of the car and facing the centre of the car. He had a paint box and brush in his hands. The other painter was on another side of the top with his back to the plaintiff. This rim or ledge was about six and one-half inches wide. Plaintiff called to the elevator operator to take him and the other painter up to the second floor and let them off there. There was evidence before the jury that when the car had reached a point where plaintiff had directed that it be stopped the car paused and suddenly started again, throwng plaintiff off his balance, which he was unable to regain until the car had reached the fifth floor, where he was caught in the weights which passed the car at that point.

In his declaration the plaintiff avers that the defendant company entered into an agreement with the Mackay Company, for hire, to operate said elevator "so that said company's employees might stand on top of the elevator and that it might be lowered or raised as was necessary in the painting of said shaft and to start and stop said elevator whenever and wherever requested." It is then averred that in pursuance of this contract with the Mackay Company the defendant company employed the Otis Elevator Company to operate and run said elevator in accordance with said agreement. The duty of the defendant company and also of the elevator company is then set forth, and the breach is averred in the following words: "that said plaintiff on the day aforesaid had finished his work, he then being on the top of the said elevator, below the second floor, requested the said defendant Otis Elevator Company, its servants and

employees to stop said elevator at the second floor, so that he might get off and alight therefrom; but the said *defendants* not regarding their said duties, did so negligently, carelessly and recklessly operate and cause to be operated said elevator, that the same was carried up to the fifth floor where the said weights and elevator met, as aforesaid in direct violation of the request of the plaintiff to stop the same at the second floor."

At the trial of the case the court, without objection on the part of the plaintiff, directed a verdict in favor of the elevator company, the other of the two defendants, there being no evidence to charge that company with any responsibility in the premises.

Before proceeding to a consideration of the various assignments of error, we deem it necessary to direct attention to the violation of Rule V of this court in the preparation of the Bill of Exceptions in this case. We have had occasion heretofore to advert to the apparent disregard on the part of counsel of this rule, and have indicated that upon proper motion such a bill of exceptions would be stricken out and the appeal dismissed. It being apparent that more drastic measures are necessary to enforce a compliance with this rule, we now state that the Court will hereafter feel called upon to take action upon its own motion in such cases. Counsel should make an effort immediately after the trial of a case to agree upon a proper Bill of Exceptions, and if they are unable to reach such an agreement the matter should speedily be brought to the attention of the trial justice whose plain duty it will then be to adjust the differences of counsel and settle a Bill of Exceptions in conformity with the rules of this Court. Such a Bill of Exceptions as is here presented entails a needless burden upon this court and an equally needless expense upon the parties to the suit.

1. It is insisted that "it was error in the trial court to decide as matter of law, under all the evidence, that Locke (the elevator operator) was the servant of the Fuller Company." This assignment of error goes to the root of the case. It is conceded that there was no conflict in the evidence upon the facts relating to Locke's employment. It therefore was the sole province of the court to determine to whom Locke sustained the relation of employee at the time the accident occurred. In other words, it was a question of law and not of fact. Did the court err? We think not. So far as this inquiry is concerned the elevator company may be eliminated from consideration. There was no privity whatever between that Company and the Mackay Company. The defendant company had a limited right to the use of this elevator equipment including the operator. It chose, for a consideration, to furnish to the Mackay company by the hour, upon the conditions previously mentioned, this elevator equipment and operator. The arrangement, therefore, was between the defendant company and the Mackay company, and the defendant company cannot now be heard to say that it did not have authority to make the contract. Eliminating the elevator company the question may be stated thus: The defendant company, to its own advantage, permitted the Mackay Company to use its elevator as a sort of movable staging, but the only control the

agreement contemplated and permitted was limited to the right to signal the elevator operator when to start and when to stop his machine. In no other respect was this operator under the control of the Mackay Company. The moment the defendant company wanted to use this elevator the painters were compelled to suspend work. We do not deem it material whether the amount paid by the Mackay company for this privilege was ultimately credited to the owner of the building or not. The defendant company was the general contractor. It used this elevator in its work. Had any other device been employed by the Mackay company in painting the elevator shaft it is evident that the operation of the elevator would necessarily have been temporarily suspended. It follows that the arrangement between the principal and sub contractor was to their mutual interest. The defendant company was primarily responsible for the painting of this shaft. It had made a sub contract with the Mackay Company to do this work. That the work might be done expeditiously and with as little interruption to its own use of this elevator as possible it said to the Mackay Company, in effect, you may paint this shaft from the top of our elevator when we are not using it, and we will tell Locke (the operator) to operate the elevator to suit your convenience, that is to say, to start the elevator when you signal and to stop it whenever and wherever you wish it stopped. For this service we will charge you one dollar an hour.

Applying the rule announced by the Supreme Court of the United States in the case of the Standard Oil Company vs. Anderson, 212 U. S., 215, followed by this Court in Sonneman vs. Philadelphia, Etc. R. Co., 35 App. D. C., 279, we think the correctness of the ruling of the learned trial Justice is apparent. In the Standard Oil case the plaintiff was a longshoreman in the employ of a master stevedore who was engaged in loading a ship with oil under a contract with the defendant. The plaintiff, while working in the hold, was injured by a load of cases containing oil which had been negligently lowered. The motive power for conveying these cases of oil from the dock to the ship was a steam winch and drum, and the hoisting and lowering was accomplished by means of a tackle, guy ropes and hoisting ropes. The tackle and ropes properly equipped were furnished by the stevedore. The winch and drum were owned by the defendant and placed on its dock at a convenient distance. The work of loading was all done by employees of the stevedore, except the operation of the winch. This was done by a winchman in the general employ of the defendant. The winchman was hired and paid by the defendant, the stevedore agreeing to pay the defendant a certain price per thousand for the hoisting. The stevedore had no control over the winchman except to give him the proper signals for hoisting and lowering. The negligence in that case consisted in lowering a draft of cases before receiving a signal. The court held that the winchman remained the servant of the defendant while performing the work described.

In the Sonneman case the Knox Express Company undertook to haul and load into a car a quantity of iron for one Simon. The

defendant railroad company had for a number of years maintained a movable engine in its freight yard equipped with derrick and boom,which it furnished without charge to those loading heavy articles upon its cars. The engineer was in the general employ of the defendant and could be discharged by it alone. The only control exercised by the shipper over this engineer was to give the signals for hoisting and lowering. The court ruled that the engineer remained the servant of the railroad company while engaged in said work for the express company.

In the present case the elevator operator was not in the general employ of the Mackay Company and was not paid by it. Neither was he subject to its discharge. There was an additional reason for restricting the control of the Mackay Company over this operator. It is well known that an elevator is a more or less dangerous and complicated mechanism, requiring in its operation some special knowledge and skill. The record shows that Locke possessed these qualifications. It is apparent that painters ordinarily would not. For this additional reason the defendant company was unwilling to surrender the general control of this elevator to the Mackay company. In other words, it insisted upon operating the elevator itself, allowing the Mackay Company to do no more than to give the requisite signals to the operator.

2. This assignment of error questions the sufficiency of the plaintiff's declaration and is based solely upon a motion by the defendant, at the close of all the evidence, that the jury be instructed "that under the pleadings and all the evidence their verdict should be for the defendant, the George A. Fuller Company." The defendant now contends that there was no proper allegation of negligence against it in the declaration, and hence that this motion for a verdict should have been granted. It is well settled that such an omnibus motion will not reach such a defect in the declaration, assuming for the moment that such a defect in fact existed. It is not the duty of the trial court but the duty of counsel to examine the declaration and point out such alleged defects, and unless this is done it must be assumed by the appellate court that they were waived. The reason for this rule is very obvious. To illustrate: One of the defences interposed by the defendant at the trial of this case was contributory negligence by the plaintiff. Another that the elevator operator, at the time of the accident, was not its servant but the servant of the Mackay company, and hence the fellow servant of the plaintiff. The trial Justice, nothing having been said as to the sufficiency of the declaration, had no reason to assume that this motion for a verdict was based upon grounds other than those specifically brought to his attention. If the sufficiency of the declaration was to be challenged it was the duty of the defendant to say so, and his failure in that regard was fatal. Mercantile Trust Company vs. Hensey, 205 U. S. 298. We may add, however, that assuming this question properly raised it is without merit. The plaintiff, probably not knowing the existing relation between the original defendants, charged negligence on the part of both, and a breach of duty on the part of this

defendant is, we think, sufficiently set forth in the two parts of the declaration already quoted.

3. The defendant asked the court to charge the jury that if the evidence showed that the accident was occasioned wholly or in part because the plaintiff "had placed himself in an exposed and dangerous position on the top of the elevator when he might readily have placed himself in a safe and secure position, the verdict should be for the defendant." The court granted the charge after amending it so that it read "if the accident to the plaintiff was occasioned wholly or in part by reason of the fact that he had placed himself in an exposed and dangerous position on the *ledge around* the top of the elevator car *with reference to obeying the signals to stop at the second floor, if you find that such signals were given,*" etc. The plaintiff did not desire to go to the fifth floor but, on the contrary, had signalled the operator to stop at the second floor. The evidence showed that he was in no danger from the weights until the elevator reached the fifth floor. What, therefore, would have been reasonable precaution on his part in preparing to ascend to the second floor might have constituted negligence had he been preparing to ascend to the fifth floor. Having this in mind the court properly modified the prayer. Whether, after the plaintiff discovered that his signal to stop at the second floor had been disregarded, he exercised due care, that is, whether he did what a reasonably prudent man would have done in the circumstances to avoid injury, was covered in another part of the charge.

Finding no error in the record the judgment is affirmed with costs.

Affirmed.

October Term, 1910.

No. 2153.

GEORGE A. FULLER COMPANY, Appellant,
vs.
WILSON A. MCCLOSKEY.

Appeal from the Supreme Court of the District of Columbia.

TUESDAY, NOVEMBER 1*st*, *A. D.* 1910.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, affirmed with costs.

Per Mr. JUSTICE ROBB.
November 1, 1910.

No. 2153.

GEORGE A. FULLER COMPANY, Appellant,
vs.
WILSON A. McCLOSKEY.

FRIDAY, *November 11th, A. D.* 1910.

On motion of Mr. E. S. Duvall, Jr., of counsel for the appellant, It is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of eight thousand dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between George A. Fuller Company, appellant, and Wilson A. McCloskey, Appellee, a manifest error hath happened, to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the 11th day of November, in the year of our Lord one thousand nine hundred and ten.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———,

——— ———.

(*Bond on Writ of Error.*)

Know all men by these presents, That we, George A. Fuller Company, as principal, and National Surety Company, as surety, are held and firmly bound unto Wilson A. McCloskey in the full and

just sum of Eight thousand Dollars ($8000.) to be paid to the said Wilson A. McCloskey his certain attorney, executors, administrators, or assigns; to which payment, well and truly to *to* be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 12th day of November, in the year of our Lord one thousand nine hundred and ten.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the said George A. Fuller Company as appellant and the said Wilson A. McCloskey as appellee, designated as No. 2153 on the General Docket thereof a judgment was rendered against the said George A. Fuller Company and the said George A. Fuller Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Wilson A. McCloskey citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said George A. Fuller Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of George A. Fuller Co.]

GEORGE A. FULLER COMPANY. [SEAL.]
By WALTER A. CLOUGH, [SEAL.]
Vice President.
NATIONAL SURETY COMPANY, [SEAL.]
By JOEL RATHBONE, [SEAL.]
Vice President.

Attest:
J. R. WELLS,
Asst. Secretary.

[Seal of National Surety Company.]

Sealed and delivered in the presence of—
Attest: FAULKNER HILL, *Secretary.*

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals
of the District of Columbia.

Surety Satisfactory.
S. H. HAYDEN,
For Plaintiff.

Endorsed: No. 2153. George A. Fuller Company, Appellant, vs. Wilson A. McCloskey. Supersedeas Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Nov. 15, 1910. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To Wilson A. McCloskey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein George A. Fuller Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 15th day of November, in the year of our Lord one thousand nine hundred and ten.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted Nov. 15, 1910.

S. V. HAYDEN,
HAYDEN JOHNSON,
HERBERT L. FRANC,
Counsel for Deft. in Error.

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov. 15, 1910. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 78 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of George A. Fuller Company, appellant, vs. Wilson A. McCloskey, No. 2153, October Term, 1910, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 15th day of November A. D. 1910.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,414. District of Columbia Court of Appeals. Term No. 444. George A. Fuller Company, plaintiff in error, vs. Wilson A. McCloskey. Filed November 22d, 1910. File No. 22,414.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 22414, TERM No. 444.

GEORGE A. FULLER COMPANY, Plaintiff in Error,
vs.
WILSON A. McCLOSKEY.

Assignment of Errors.

The Court of Appeals erred in sustaining and affirming the action of the trial court—

1. In granting the first prayer of the plaintiff (Rec., p. 55).
2. In granting the second prayer of the plaintiff as amended (Rec,. p. 55).
3. In refusing to grant the defendant's first prayer (Rec., p. 56).
4. In refusing to grant the defendant's third prayer as asked (Rec., p. 56).
5. In refusing to grant the defendant's fourth prayer (Rec., pp. 56 and 57).
6. In refusing to grant the defendant's fifth prayer (Rec., p. 57).
7. In refusing to grant the defendant's seventh prayer (Rec., p. 57).
8. In its oral charge, in instructing the jury that the elevator operator, Locke, was for the purposes of the case an employee of the defendant, as will appear by the exception taken (Rec., p. 62).

And the plaintiff in error prays that the judgment of the Court of Appeals may be reversed with directions to remand the cause for a new trial.

Respectfully submitted,

E. S. DUVALL, JR.,
Attorney for Plaintiff in Error.

[Endorsed:] File No. 22,414. Supreme Court U. S., October Term, 1911. Term No. 444. George A. Fuller Company, Pl'ff in Error, vs. Wilson A. McCloskey. Assignment of Errors. Filed December 13, 1911.

Office Supreme Court, U. S.
FILED.
DEC 19 1912
JAMES H. McKENNEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 176.

GEORGE A. FULLER COMPANY, PLAINTIFF IN ERROR,

vs.

WILSON A. McCLOSKEY, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

EDWARD S. DUVALL, JR.,
Attorney for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 176.

GEORGE A. FULLER COMPANY, PLAINTIFF IN ERROR,

vs.

WILSON A. McCLOSKEY, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

I.

Statement of Case.

This action was instituted by the defendant in error, Wilson A. McCloskey, as plaintiff, in the Supreme Court of the District of Columbia, to recover damages for personal injuries sustained by him while riding on the top of a passenger elevator, owned and operated by the Otis Elevator Company, in a building which was under construction by the plaintiff in error.

The case was tried before the Supreme Court of the District of Columbia upon an amended declaration, which

named both the plaintiff in error and the Otis Elevator Company as defendants, and separate pleas of not guilty. Verdict directed for Otis Elevator Company at close of plaintiff's case-in-chief, to which action of the court counsel for plaintiff took no exception. A directed verdict for the George A. Fuller Company was also requested at the time but refused and exception noted (Rec., p. 42). The trial resulted in a judgment in favor of the plaintiff for $5,425.00 (Rec., p. 5). An appeal was taken by the defendant to the Court of Appeals of the District of Columbia (Rec., p. 5), where the judgment below was affirmed (Rec., p. 70). The declaration, which is in one count (Rec., pp. 1, 2, and 3), claims damages in the sum of $10,000, and charges in substance that on August 9, 1907, the George A. Fuller Company was building the Hibbs Building, at 723 Fifteenth street northwest, in the city of Washington, in which building was located an electric elevator, operated in a shaft extending the height of the building, ten stories, and having counterbalance weights moving up and down between the cage and the wall of the shaft, which said cage and weights meet at the fifth floor; that the Robert E. Mackay Company was employed by the Fuller Company to paint the said elevator shaft in its various parts, and that it entered upon such work; that plaintiff was employed by the said Mackay Company and by it was directed to do the manual work of the painting of said shaft, and on the day and year mentioned was engaged in such work; that in order that the Mackay Company might more conveniently and expeditiously paint the shaft, the Fuller Company entered into an agreement with the Mackay Company for hire, to operate the elevator, so that the latter's painters might stand on top thereof and be raised up and down, as became necessary in the painting work; that in pursuance of this agreement for Mackay Company's use of the elevator the Fuller Company employed the Otis Company to operate the said elevator and to start and stop the same at such times and places

as McCloskey or any other employee of the Mackay Company might direct; that it was the duty of the Fuller Company to operate the elevator as the Mackay Company or any of its employees engaged in the painting work might designate, and not to start the same, or if started, not to carry it farther than they designated; and that it became the duty of the Otis Company to execute the requests of the plaintiff's firm, or its employees, and not to start the elevator or carry it beyond the point designated; that plaintiff had finished his work, then being on top of the elevator below the second floor, and requested the Otis Company and its servants to stop the elevator at the said floor, so that he might get off, but the defendants carelessly operated the elevator, so that it was carried up to the fifth floor, where the weights and elevator meet, in violation of the plaintiff's request to stop at the second floor, and by reason thereof, the plaintiff was injured.

According to the evidence (Rec., pp. 47, 48, and 49) the Hibbs Building was being erected under a written contract between the Fuller Company and William B. Hibbs, which did not provide for the construction nor installation of elevators, elevator machinery or parts; such elevators, machinery and parts being supplied and installed by the Otis Company under a separate and independent written agreement made by the latter directly with the owner, William B. Hibbs (Rec., p. 31). The Otis Company began the installation of the elevators during the erection of the building by the Fuller Company and completed the installation and turned them over to Hibbs long after the Fuller Company completed the building and turned it over to the owner (Rec., p. 30), and for approximately nine months, during this period of installation, the Otis Company employed an operator to take care of the elevators and machinery and to run the same (Rec., pp. 19 and 51).

The Fuller Company employed a sub-contractor, the Mackay Company, to do all the painting work about the

Hibbs Building, and entered into a written contract with the said sub-contractor, which provided, among other things, that the Mackay Company should provide all the materials and perform all the work mentioned, which by a supplemental written agreement for extra work, included the painting of the elevator-shaft in question (Rec., pp. 32, 33, and 34).

McCloskey at the time of the accident, and for some time prior thereto, was in the employ of the Mackay Company, the sub-contractor for the painting work, and was never in the employ of plaintiff in error, the Fuller Company.

Locke, who operated the elevator in question on the day of the accident, was in the employ of the Otis Company, and had been in such employ and working at the Hibbs Building for a long time prior to the accident (Rec., p. 51). He was a skilled mechanic, selected and hired by the Otis Company, who passed upon his qualifications for mechanical work; was paid his wages by the Otis Company; was under the sole direction and control of the same company, which alone had the right to discharge him, and the said company at all times designated the work he was to do (Rec., pp. 38, 39, and 52).

At the time of the accident, McCloskey was engaged in painting the elevator shaft, which was the work of the Mackay Company and covered by the contract between it and the Fuller Company, and Locke, the employee of the Otis Company, was assisting McCloskey, by operating the elevator under the orders of the latter, so that McCloskey, who was standing on top thereof, could move from one floor level to another and touch up black spots with his paint brush (Rec., pp. 9, 39, and 51). McCloskey had been painting in the elevator shafts, and particularly the one where the accident occurred, for several weeks (Rec., pp. 9, 10, and 16), and had used the elevator in question a number of times, Locke always operating it. On such occasions the Mackay Company was using the elevator as a

substitute for a movable stage or swinging scaffold to save expense and expedite its work (Rec., pp. 37 and 39). Its contract with the Fuller Company did not require it to use the Otis Company's elevators to paint inside the shafts nor did it specify in what manner it was to do the work. It appears from the evidence that it was customary with the Mackay Company to hire the elevator when painting in large buildings (Rec., pp. 35 and 37) and not erect any scaffolding. It was at liberty to do this work in any manner and with any means, so long as it complied with the specifications and satisfied the architects for the Hibbs Building (Rec., p. 32). It could have used scaffolding or a swinging stage (Rec., p. 39), but for reasons best known to itself preferred to hire the elevator in question together with its operator, and when it was so used by the employees of the Mackay Company, among whom was McCloskey, the operator, Locke, was under their direction and control and worked under the orders given by them, McCloskey usually acting as foreman and giving the orders (Rec., pp. 36 and 39).

The Fuller Company did not direct nor control the painting work or the manner in which it was done, and exercised only such supervision over the work as was reserved by the said contract and necessary to enforce compliance with the specifications (Rec., pp. 42, 47, and 52). Neither did the Fuller Company exercise any direction or control over the Mackay Company's employees or Locke, the elevator operator, while working with the painters (Rec., pp. 38, 42, 43, and 52).

The evidence showed that the Fuller Company frequently used the elevator for hauling trash down from the upper floors of the building and Locke operated it, for which service the Otis Company made a charge. Whenever this occurred, Locke, the elevator operator, received his directions from the employees of the Fuller Company, who would tell him where to take them (Rec., p. 43).

The direction and control over Locke, the employee of

the Otis Company, which was exercised by the Mackay Company and its employees while doing the Mackay Company's work was equal to, if not greater than, that exercised over Locke by the Fuller Company when it was using the elevator for any purpose.

The Otis Company supplied the Fuller Company with elevator service and charged $3.00 per day, but the Otis Company would allow no one to operate it but one of its employees, whom it paid by the week, and the Fuller Company could only use the service when its use was not required by the Otis Company (Rec., pp. 49 and 50).

The Mackay Company arranged with the Fuller Company for use of the elevator and operator during the period for which the Otis Company was charging the Fuller Co. and agreed to the payment of an hourly charge, as the Mackay Company frequently used it at intervals and then for several hours at a time only. The agreement was verbal and between the resident manager of the Fuller Company and the foreman of the Mackay Company. It was understood between them that the Mackay Company hired the elevator and operator to assist in painting the elevator shaft, and that while so employed the Mackay Company was to have the *exclusive use* of the elevator and the operator, for which it was to pay $1.00 per hour (Rec., pp. 49 and 50). The Otis Company had a foreman on the job, who kept Locke's time and also the time the elevator was in service and reported it to his company. The Otis Company also knew that the painters were using the elevator (Rec., p. 19). The Otis Company rendered statements or bills to the Fuller Company, charging it for the total time the elevator service was used, including use of the same by the Mackay Company, and the Fuller Company rendered statements to the Mackay Company, charging for the number of hours the latter used the elevator. This charge against the Mackay Company was deducted from the contract price for the painting work and credited to the owner of the building, who by the terms

of the contract for its erection was to pay the cost thereof, plus a certain named percentage of the total cost as compensation to the contractor, the Fuller Company (Rec., pp. 48 and 49). This charge against the Mackay Company for the use of the elevator for painting the shaft, therefore, not only reduced the cost of the building, when credited as explained, but also reduced the compensation of the Fuller Company. From this it will be noted that there was no element of profit to the latter in the arrangement made by the Mackay Company for the hiring of the elevator and operator to paint the shaft.

The injuries of which the plaintiff complains were received by him on August 9, 1907, by being struck on the heel by the elevator counter-balance weights, while finishing his painting work.

The Evidence.

The evidence, in brief, was as follows:

According to the evidence given by the plaintiff he was on top of the elevator on the day of the accident, as was also Renner, another painter in the employ of the Mackay Company, but the latter had his back to McCloskey (Rec., p. 17). The elevator was standing at the first floor, and its top was several feet below the second-floor level. Locke, the employee of the Otis Company, was in charge of the elevator and had been operating it under the orders of McCloskey since 7.30 the morning of the accident, going slowly up and down in the shaft to permit the plaintiff and Renner to touch up spots in the shaft. The elevator was stopped and held in position by Locke at any points designated by McCloskey. The accident occurred about 9.30 a. m. on August 9, 1907. For three weeks previous to this date the plaintiff had been using the elevator as a movable stage, with Locke operating it, to paint the shaft. McCloskey was in charge and gave the commands or instructions to the elevator operator on the

day of the accident, as he had done on previous occasions. They had finished in the shaft as far down as they could go without getting under the car and wanted to get off at the second floor, so they could go underneath and complete the painting. He ordered Locke to go to the second floor and let them off. There were a couple of men in the elevator at the time, and he did not know whether Locke made any response to the order. Locke started up, and when he got to the second floor, paused as though about to stop. Plaintiff had a paint box and paint brush under his arm and made an effort to get ready to open the door at the second floor, and when they got there he started to open the door (Rec., pp. 7 and 13). All at once the elevator started again and caught the plaintiff in the weights at the fifth floor.

The plaintiff testified that when he ordered Locke to go up to the second floor, he was standing on the 6-inch ledge of the elevator, between the front of the elevator and the weights, in the space measuring 17 inches, with his feet pointing in the direction of the door, which is in the front, and that he was not holding on to anything (Rec., pp. 7 and 15). See second figure of plan of elevator on page 63 of Record. His back was toward the descending weights and he was facing the front of the elevator. When the operator was inside the car he could not see the men on top, because it was not an open top. Plaintiff knew where the weights traveled and that they passed the car about the fifth floor. When the elevator passed the second floor he was thrown off his balance, but he made no effort to have the elevator stopped and made no outcry (Rec., p. 13). Before he could get up he was fast in the weights. He always told the men working there to look out for the weights and was himself careful. He knew that there were cross-bars on top of the elevator and would sometimes hug up in there, but on this occasion did not do so, although he supposed he could have gotten in there. It would, however, have been a lot of trouble, with his hands full of stuff as they were (Rec., p.

14). At another place in the record the evidence of the plaintiff is that the elevator stopped at the second floor and then started again (Rec., p. 13).

The next witness for the plaintiff was Renner, the other painter working with McCloskey on top of the elevator when the accident occurred, and he testified that he was standing on the front ledge of the elevator and holding onto the cables by which the elevator was suspended. He had his back toward McCloskey and was facing the front of the elevator. The elevator sort of paused at the second floor and then went on, but the pause had no effect on him and he heard no commotion or outcry on the part of McCloskey, and the first he knew what had happened was when the elevator stopped at the fifth floor and McCloskey told him his foot was caught (Rec., p. 17). When the elevator reached the first floor, before the accident, McCloskey was standing in the place, to Renner's left, where he finished work, but he did not notice McCloskey's position after they started up (Rec., p. 17). He heard McCloskey tell Locke to take them to the second floor, so they could get off and go underneath the car, but he did not hear Locke make any response. He did not notice what effect the starting had on McCloskey, but when the car stopped suddenly at the fifth floor he asked McCloskey what was the matter. He did not notice anything while the elevator was going up, and in a few minutes McCloskey was caught, and that was all he knew. He admitted on cross-examination that on the day of the accident he had made a statement to the superintendent for the Fuller Company, telling how the accident occurred, and he might have informed him that the elevator did not stop at the second floor, and that he and McCloskey stood just where they were and did not change their positions (Rec., p. 17). He testified that he and McCloskey did not stand on the cross-bars on top of the car because they had only a short distance to go and did not need to. If they had been going beyond the fifth floor they would have pre-

pared themselves. He did not believe McCloskey had hold of anything, although he did not know (Rec., pp. 17 and 18).

Ramsey W. Scott, the next witness for the plaintiff, testified that he was the local manager for the Otis Company. He knew that the Otis Company was furnishing a man by the name of Locke for the running of an elevator in the Hibbs Building, but could not state under what arrangement Locke was furnished. Any such arrangement was verbal and was very likely made by the foreman of the Otis Company, in charge of the work at the Hibbs Building and the Fuller Company. Witness didn't make the arrangement himself. The Otis Company supplied a man to run the elevator and care for the machine. He ran the car during the day and cleaned the machine in the evening to have it in readiness for the next day. The operator was paid by the Otis Company, and the Fuller Company was charged $3.00 a day. The bills were paid by the Fuller Company. At that time the Otis Company had not formally turned over the elevator to Mr. Hibbs, the owner of the building.

On cross-examination witness testified that Locke was on the time-books of the Otis Company, which company charged the Fuller Company $3.00 a day and double pay for overtime. The Otis Company had a separate contract with Mr. Hibbs to install the elevators. Locke was continued in the employ of the Otis Company until the elevators were turned over to the owner, and he remained in their employ for some time after the work of the Otis Company was finished. We charged the Fuller Company for the service of a caretaker and operator. That is the only charge witness recalls. We made a profit on the operator's salary. The foreman of the Otis Company kept an account of the time that the Fuller Company used the elevator. After the Fuller Company stopped using the elevator we cleaned them and made such adjustments as were necessary to complete the plant. As soon as the Fuller Company had no further use

for our man we took him away. He might have been there a short time afterwards giving instructions to operators employed by the owner. At the time of the accident he was simply running the car and taking care of the machine.

Witness Scott further testified that Locke was employed and placed on the pay-oll of the Otis Company.

Thereupon there was offered in evidence an invoice delivered by the Otis Company to the Fuller Company, showing that the Fuller Company owed the Otis Company $150.72 for one man to take care of elevator and operate same, and for certain materials, such as fuses, grease, candles, and waste. This bill was paid by the Fuller Company to the Otis Company, less certain counter-charges, the amount of the voucher in payment being $65.

Locke was taken into the employ of the Otis Company prior to the construction of the Hibbs Building. At the time he placed Locke upon the elevator the Otis Company was responsible to the owner for turning over the elevators in a satisfactory condition and the Otis Company did not want an inexperienced man. The Otis Company wanted some one there who could look after the maintenance of the machinery. A temporary elevator was once prior to that time installed to hoist building materials for the Fuller Company, and the Otis Company started to operate it with Locke or some other employee, but the hoisting engineers objected to this arrangement and we had to take our employee off and a hoisting engineer was employed while they were hauling building materials. After we stopped running the elevator for hoisting building materials we put our man Locke back on the elevator. Our superintendent employed Locke, and he was supposed to pass upon his qualification. While a hoisting engineer ran the car for hoisting building materials Locke was there to clean the machines and look out for them. Later Locke served the twofold purpose. Locke was in our employ from July, 1907, and on after. There is no question that Locke was in the employ of the Otis Company from the period covered by the invoice, from

July, 1907, on, and that during that period Locke could not have been discharged by the Fuller Company. The Fuller Company had no authority to discharge Locke while he was at work about the elevators or operating the elevators, and they did not have any such authority on the day of the accident, that is, on the 9th of August, 1907. The Fuller Company could have made a request of the Otis Company to discharge Locke, and if the reasons warranted it, Locke would have been discharged, but the Fuller Company had no authority on the date of the accident to take Locke off the machine and substitute another operator. The superintendent of the Otis Company placed Locke at work in the Hibbs Building for the purpose of running the elevator, and the Fuller Company had nothing to do with the selection of Locke as an employee for the purpose of running the elevator at the time of the accident, or at any other time. The witness knew during July and August, 1907, to what use the elevator was being put by the painters (Rec., p. 30); he knew the Fuller Company turned the building over to the owner, Mr. Hibbs, long before the Otis Company turned the elevators over.

On cross-examination by the Otis Company, the witness further testified that the invoice to the Fuller Company did not include anything for the use of the elevator itself; that no bill was rendered to the Fuller Company for the use of the elevator during the time covered by the invoice; that the invoice for the service of a man to take care of the elevator and to operate it, did not cover any work which the man did for the Otis Company during the time covered by the invoice. During the time covered by the invoice the operator was in a way *subordinate to the foreman of the Otis Company*, but during that time the operator was told by the Fuller Company's representative when the Fuller Company would use the elevator and when it would not; that witness had no knowledge of his company ordering Locke to do any work for the Otis Company during the time Locke was operating the car. That if the Fuller Company had requested

witness to replace Locke with another operator, such request would undoubtedly have been granted. Locke reported the accident to the Otis Company. The Fuller Company was the general contractor for the construction of the Hibbs Building, but the Otis Company's contract for the elevators was not made with the Fuller Company, but was made directly with Mr. Hibbs, the owner of the building. During the time covered by the invoice Locke may have put in part of a day for the Otis Company and part for the Fuller Company, but we could not tell as to the exact arrangement on that day, but all the Fuller Company had to do with the elevator and its operator was to tell the operator what floors to go up to, when to stop, and what to carry up, and could say how long they wanted the operator. The operator kept the time.

The plaintiff then offered in evidence the contract between the Fuller Company and the Mackay Company, dated December 24, 1906, and the letter of proposal from the Mackay Company, dated December 14, 1906, and an order for extra work from the Mackay Company dated February 26, 1908, as appears on pages 32, 33, and 34 of the record, and the substance of the proposal of December 14, 1906, was that the Mackay Company proposed doing all the painting on the Hibbs Building according to the revised plans and painting specifications, but not including the back painting of the plumbing fixtures, for the sum of $2,400. The contract of December 24, 1906, provided that Mackay should *provide all materials and perform all the work* mentioned in the specifications. The order for extra painting dated February 26, 1908, related to relettering the second, sixth, and seventh floor toilet-room doors, touching up the walls in the elevator shaft, repainting the walls of ten office closets and the adjustment of the charge for cleaning floors, all for the sum of $75.75.

Thereupon plaintiff read the deposition of Robert E. Mackay, who testified that his company did the painting and hard-wood finishing in the Hibbs Building. The labor

required by the contract was employed and paid for by the Mackay Company, whose foreman in charge of the work was Robert E. Minte; that during their work in the Hibbs Building the Mackay Company used the elevator to paint the elevator shaft, as they always did in big buildings, and the general contractor charged therefor, as is the usual custom in same work. The Mackay Company paid one dollar an hour to the Fuller Company for the use of the elevator, and witness produced the invoice sent him by the Fuller Company, showing a charge of $25 for the *use of the elevator* in painting the elevator shaft and tracks from July 3d to August 9th. This bill was paid by the Mackay Company. The contract for the use of the elevator from the Fuller Company was not in writing. The elevator was not operated by an employee of the Mackay Company. That during the time the Mackay Company had the elevator in use no one else had the right to use it (Rec., p. 36). That the Fuller Company charged only for the time the Mackay Company used the elevator to paint the shafts. He supposed the Mackay Company's painters, who were working on top of the elevator, directed the movements of same, and told the operator to go up or down. Witness, however, did not hire the operator, had no control over him, nor the right to discharge him. That he had the right to direct the operator where to stop and when to go on, to suit the convenience of his workmen. The only persons who had any say as to the movements of the operator were the plaintiff, McCloskey, and the other men, supposed to be on the elevator, and the foreman of the Mackay Company.

The plaintiff then read the deposition of Robert Minte as follows:

Employed by Mackay as foreman of painting at Hibbs Building. Mackay had *use* of elevator, and witness made the arrangement with Baird, manager of the Fuller Company. Witness was to use the elevator and no passengers were to be carried while shaft was being painted, and witness was to turn it back to Fuller when they had any material to carry.

The *hiring included everything* because witness had no man to run it. Mackay Company didn't pay the operator. If they used scaffolding, would have had to shut down the elevator. Witness had no control over the operator. Neither witness nor Mackay Company had any control over the operator, except to tell them where to go and where to stop. It was up to the painters to give orders while they were working on the car. We *hired the elevator* by the hour (Rec., p. 37). We would have it for half an hour or an hour, and give it back again to haul up materials. Fisher, Fuller's superintendent, would request it (see page 38). Witness learned that they had been taking passengers up and spoke to Locke about it, and Locke said he would take no orders from Minte or Fisher, but only from the Otis people. Only carried passengers once. His understanding with Baird was that when he had the elevator, he would have the *exclusive use* of it (Rec., p. 38), and the only exception was when Fuller wanted to haul material. No interruption to Mackay during the three or four hours they were using it on August 9, 1907. He told Fisher about what Locke said, and Fisher told him (Minte) *that Locke would not take any orders from him* (Fisher). Witness had the use of elevator, operator, power and everything.

Then follows a lot of medical proof.

Then the court directed a verdict in favor of the Otis Company, in which ruling plaintiff acquiesced, and took no exception. The court then refused to instruct in favor of the Fuller Company, which company, however, went into its proof as follows.

Francis Fisher, superintendent of Fuller Company on August 9, 1907, testified as follows: Locke was not employed by Fuller, and never had been. He was employed and paid by the Otis Company. Locke was operating the machine. The elevator at the time of the accident was being used by Mackay, and while used by them Locke was under their orders. Witness informed Locke that he must take his orders from Minte or Minte's representative when Mackay

was using the elevators. No supervision was exercised by Fuller Company, and no orders given by them as to doing the painting. Whenever he wanted to use the elevator, he would ask Minte for it and Minte would turn it over, but while Mackay was using it he (Fisher) or the Fuller Company had no control over it. Mackay Company's painters started to work at half-past seven on August 9, 1907, and worked about three hours before the accident occurred. When Minte was not at the building he left signals to be given by one of his, Minte's, men in the elevator shaft, and the plaintiff McCloskey was the one who gave the signals. Witness saw the plaintiff at work in the elevator shaft on three or four occasions previous to the day of the accident, and had seen him on top of the cage of the east elevator. At the time of the accident witness was not in the building. Witness knew the construction of the elevator, and knew that a person could sit or ride on top of the cross-bars, or stand on top of the same. Witness had often ridden on top of the elevator in that position. A person could stand on the dome of the elevator top and hold on to the cable which supported the elevator. A person sitting or standing on the cross-bars would be at least a foot and a half away from the counter-balance weights at the east side of the elevator.

On cross-examination witness testified that Locke did not report to him the number of hours he worked in the elevator, but reported to the Otis Company. Witness did not know anything about an agreement between the Fuller Company and the Mackay Company. All he knew was that the Mackay Company used the elevators, and that the *same equipment that hoisted materials for the Fuller Company was used by the Mackay Company for painting from the top of the elevator.* At the time Locke was being used by the Mackay Company witness exercised no control over him. When the operator was employed by the Fuller Company witness had charge of him, but witness did not direct the operator to operate the elevator for anybody else. Witness

had informed Locke to obey the orders of Minte and his painters while operating the elevator. Fisher had ridden upon top of the said elevator, by standing on the cross-bars and holding to the cable and while in such position had carried up in his arms six pieces of flooring. Witness could have stood in the same position holding to the cable and could have held in the other hand the stippling brush and pot of paint testified by the plaintiff to have been carried up by him.

Witness further said that on the morning of August 9, 1907, he told Mr. Locke to act according to the way Mr. Minte directed him, and that he, Minte, *was to have charge of him* and give him, the said Locke, his instructions about the running of the elevator. While the Mackay Company were using the elevator it had control of the operator, and was to give the signals, and the understanding the witness had with Minte was that Minte was to have *the exclusive use* of the said elevator. On the morning of August 9, 1907, nothing was said between him and Locke about the signals.

Philip F. Gormley testified that on August 9, 1907, he was employed by the Fuller Company as general superintendent. He made no arrangement with the Otis Company relative to the use of the elevators, but there had been some arrangement relative to a *temporary* hoist or elevator. At that time the Fuller Company had an engineer to operate the elevator, and the Otis Company had a man to look after the machine. Witness knew nothing about any arrangement between the Fuller Company and the Mackay Company. Witness knew that the Mackay Company used the passenger elevators for hoisting paints to the fifth floor and used the elevators for other work. Locke, the operator, was employed by the Otis Company, which paid him. The Fuller Company had no control over him, and no right to discharge him or to substitute some one else for him. Witness was general superintendent of the Fuller Company, and

had charge of all their work in Washington, including the Hibbs Building.

James Baird testified that he was the manager of the Fuller Company; that the work of constructing the Hibbs Building was under his control, and he knew of the contract entered into between Mr. Hibbs and the Fuller Company.

Thereupon the original contract between the Fuller Company and Mr. Hibbs, dated September 22, 1906, was offered in evidence, and provided in substance that the Fuller Company should provide all the materials and perform all the work for the erection of a ten-story and basement steel-skeleton fireproof office building according to drawings and specifications, which, however, *did not include the construction or installation of the elevators.* Hibbs required the Fuller Company to complete the building within ten months, and agreed to give the contractor possession of the building site not later than the date of the contract. The sum to be paid to the Fuller Company was the actual cost of work and materials, plus eight per cent for the supervision of construction by the Fuller Company. It was further agreed that if the total cost of said work and materials and said eight per cent additional should exceed a certain stipulated sum, then the said Fuller Company was to receive only the stipulated sum in full payment for all work, materials, and supervision.

Witness proceeded to testify as follows:

I recall Mr. Minte coming to see me about the use of the elevators. He said he wanted to have the use of the elevators at times. I told him he could have the use of them under the customary arrangement; that whenever he wanted to use the elevators, if the Otis Company or ourselves were not using them, he could have the use of them for any purpose he might desire, and we would charge him the customary rate of one dollar an hour. Nothing whatever was said between me and Mr. Minte as to the work of hoisting the elevators up and down. He came to me and asked for the *use* of the elevators. I told him he could have it, and

that included everything that went with the elevators. The charges for this use were made against the Robert E. Mackay Company. The one dollar received by the Fuller Company from the Mackay Company was credited to Mr. Hibbs.

And thereupon the witness further testified that he did not recall any arrangement with the Otis Elevator Company for the use of that elevator; that it is customary for the builder to use the car for the benefit of all desiring it; that he did not think there was any special arrangement made and that he was the only one to make any such arrangement.

Witness then proceeded to testify as to the construction of the elevator, and said that a person could stand on the top of the dome and hold on to suspending cables connected with the cross-bars. Witness told Minte when they arranged to have the Mackay Company use the elevator that while the Fuller Company was charging the Mackay Company the latter company was to have *the exclusive use* of them (Rec., p. 50), and that he would not interfere with Mackay's use without making his request for them in due time for Minte to dispose of his men to other advantages, and that if the use of them at one o'clock in the afternoon was desired by the Fuller Company notice would be given to Minte some time during the forenoon; but if the Otis Company wanted to use the elevators it would have first call on them at all times. *The Mackay Company paid a dollar an hour for the elevator, its service and operator. They were renting it and paying for it.* There was no other conversation between him and Minte relative to the use of the elevator by the Mackay Company.

Joseph P. Locke was next called as a witness and testified that he was running the elevator at the time of the accident, and on that day was employed by the Otis Company and had been so employed continuously for five months, and his employment continued for four months after the accident. At the time of testifying he was employed by the Washington Times at the Munsey Building. Prior to the day of the accident the painters had been painting the elevator shaft,

going up end down a number of times, and he worked with them, running the elevator according to their directions and holding it at places to enable them to touch up spots in the shaft.

On the morning of the 9th they began work about 7.30. Witness was informed that the painters would use the elevators that day as they had done before. He began operations by throwing in the switch and getting ready; that about twenty minutes after 7.30 the painters started to work, painting the east shaft, and they continued that operation a number of times, going up and down in the shaft frequently; that finally the elevator, with the painters, including the plaintiff, reached the bottom of the shaft. Witness presumed they were painting and ready to go up again. He had been during all these operations receiving orders from the plaintiff, who was on the top of the elevator working with the other painter. When the elevator was at the bottom he called to plaintiff, who said to him, "We are ready to go up," and he asked the plaintiff if he was ready and the plaintiff replied, "Yes, I am;" that he then said to the plaintiff, "Look out for the weights," and the plaintiff replied, "All right." Before moving the car he called to the painters a second time, saying, "Mac, be careful of the weights," and the plaintiff said, "I am all right. Go ahead," which he did. Witness then started the elevator on the first speed, which was its slowest speed, and proceeded up, the trip being continued until the elevator came to a standstill, caused by the weights striking the plaintiff's foot. Witness then jumped out of the car, went into the basement where the machinery was installed, lowered the same and released the plaintiff's heel; that neither the plaintiff nor the other painter, Mr. Renner, ordered him to stop at the second floor; that on the day of the accident the plaintiff had been giving all the orders and directions to him, and that if he had been directed to stop at the second floor there was no reason why he should not have done so. When he jumped out of the car and saw

that the plaintiff was hurt, the plaintiff made no complaint about his operation of the elevator, nor did the plaintiff say anything about the elevator not stopping at the second floor (Rec., pp. 51, 52). He saw McCloskey's foot on the flat rim at right angles with the weight, and his body leaning towards the center, with his hands resting on the cross-bars. While the elevator was used by Mackay Company's painters, he operated it on the first speed. While the elevator was used by Mackay Company's painters, especially on the day of the accident, Locke received all of his orders from McCloskey, including the movement of the elevator up and down as a movable stage and everything else pertaining to the painting of the shaft, and while doing this work for the Mackay Company neither the Fuller Company nor any of its employees attempted to interfere with him in any manner. He was authorized to obey any orders given to him by the foreman of the Mackay Company, who in this instance was McCloskey (Rec., p. 52); that on moving the elevator up and down he would stop at different places to permit the painters to touch up spots upon orders from them; that on this last-mentioned trip he was not directed to stop at any floor. The witness further testified that he never told the plaintiff that he was employed and paid by the Fuller Company. Witness further said that on this last trip, after placing the lever at the first speed notch, he held it there with his hand all the time, and there was never any pause in the movement of the elevator until it was stopped by McCloskey's foot.

On cross-examination he said that at the time the plaintiff was at work in the elevator witness obeyed the plaintiff's signals, and the plaintiff exercised that control over him. On the morning of the accident he began at the bottom of the shaft with the painters, and worked with them up and down the shaft a number of times, stopping as they indicated; that on the last trip prior to the accident the painters did not order him to stop at any particular place. He under-

stood they were going to repeat the operation as they had done before, which was going over the shaft and touching up the spots; that at the time of the accident there were two passengers in the elevator, but they didn't say which floor they wished to go to; that McCloskey told him he could take the passengers in the elevator after he had first asked if he should do so. This permission was given to him at the first floor just before the elevator was started up. He told plaintiff there was a couple who wanted to go up as we went and he said to the plaintiff, "Can they go?" to which plaintiff replied, "Yes" (Rec., p. 52).

Ramsey W. Scott, recalled as a witness for defendant, testified that he was acquainted with the construction of the elevator, and that a man could stand or sit upon the cross-bars on top of the elevator and keep out of contact with the counter-balance weights; that it would be nearly impossible for a person standing on the cross-bars and holding on to the cables to come near enough to the counter-balance weights to permit such person's feet to be struck by the weights. He further testified that it would not be safe to ride on the top of the car in approaching the top floor, unless the elevator operator was cautioned to slow down and stop it before the grating at the top of the shaft was reached; that if such caution was given to the operator it was comparatively safe to stand or to work on the cross-bars. Witness testified that in riding on top of the elevator and on the aforesaid cross-bars or the other diagonal set of cross-bars, termed cross-head, with a stippling brush and a pot of paint, a person should have one hand disengaged and with the other hand hold to the aforesaid cables.

Dr. Frank Leech, on behalf of the Fuller Company, testified that he found the tendo achillis had been injured about four and a half inches above the sole of the heel; that the fracture of the heel bone had perfectly united, and that there was no evidence of any other injury, and there was no evidence of the fracture in the heel bone; that from the

character of the scar on said tendon the plaintiff's foot must necessarily have been at right angles to the weights when the heel was caught. Witness further testified that it would have been impossible for a man standing with his right foot in the position claimed by plaintiff to receive the injury which the plaintiff received, and that the weights could not have produced such an injury if they had hit the side of the plaintiff's foot.

Dr. Wellington testified that from the character of the injury received by plaintiff and the location and character of the scar as described in the hypothetical question propounded to him it would have been absolutely necessary for the weight to have hit the plaintiff's heel perfectly square and at right angles to the foot in order to have produced such an injury to the *tendo achilles*, and that if the tendon had been hit from the side he did not believe it would have been possible to have crushed the tendon without crushing the whole foot, because the said tendon is very strong, very thick and powerful.

On cross-examination witness said that if the plaintiff had been standing in the position testified to by him, and had been thrown off his balance, still his heel must have been at right angles to the weight when struck in order to have produced the injury described.

Thereupon the plaintiff was recalled as a witness in his own behalf and testified that on the morning he was injured he did not have any conversation with the elevator operator, agreeing that the operator should carry a passenger or passengers, and that nothing was said in that respect between the witness Renner and the operator or between him and the operator.

The plaintiff also recalled Newton D. Renner, who testified that he did not remember anybody telling the elevator operator that he could carry passengers on the trip which resulted in the injury to the plaintiff, and that he did not remember any such conversation.

This was all the evidence in the case.

II.

Assignment of Errors.

The Court of Appeals erred in sustaining and affirming the action of the trial court—

1. In granting the first prayer of the plaintiff (Rec., p. 55).

2. In granting the second prayer of the plaintiff as amended (Rec., p. 55).

3. In refusing to grant the defendant's first prayer (Rec., p. 56).

4. In refusing to grant the defendant's third prayer as asked (Rec., p. 56).

5. In refusing to grant the defendant's fourth prayer (Rec., pp. 56, 57).

6. In refusing to grant the defendant's fifth prayer (Rec., p. 57).

7. In refusing to grant the defendant's seventh prayer (Rec., p. 57).

8. In its oral charge, in instructing the jury that the elevator operator, Locke, was for the purposes of the case an employee of the defendant, as will appear by the exception taken (Rec., p. 62).

III.

ARGUMENT.

It will appear from an examination of the declaration in this case, and particularly from that portion of the declaration appearing at page 2 of the record, that the plaintiff charged that the Fuller Company was engaged in the work of constructing the Hibbs Building, and in the course of that work employed the Mackay Company to paint the elevator shaft; that Mackay in turn, in the performance of its subcontract, employed the plaintiff and directed the plaintiff to assist in this work. In order that the Mackay Company might more conveniently do its work, the Fuller Company entered into an agreement with the Mackay Company for hire to operate the elevator, so that the elevator might be lowered or raised as was necessary in the painting of the shaft, and whenever the plaintiff or any other employee of the Mackay Company might so direct; that in pursuance of this contract the Fuller Company in turn employed the Otis Company to operate the elevator, to start and stop the same at such times as the employees of the Mackay Company might direct. That it became the duty of the Fuller Company so to operate the elevator as the plaintiff's employer or any of its employees might designate, and not to start the same, or if started, not to carry the same farther than might be designated, and that it was the duty of the Otis Company to execute the requests of the plaintiff's firm, or any of its employees, and especially not to start the elevator, or if started, not to carry it beyond the point designated.

So far we have an allegation of an alleged duty due the plaintiff by the Fuller Company.

The declaration then, at the top of page 3, goes on to allege that the plaintiff requested the Otis Company to stop the elevator at the second floor, so that he might get off, and

alight therefrom, but that the *defendants* negligently operated the elevator so that it was carried up to the fifth floor, and by reason of such carelessness the plaintiff was injured.

In other words, we have the charge that it was the duty both of the Fuller Company and of the Otis Company to operate the elevator at the request of the plaintiff, and not to carry the elevator beyond the point designated by the plaintiff; that the plaintiff requested the employees of the Otis Company to do a certain thing, which was not done.

There is no charge of any breach of duty whatever on the part of the Fuller Company, which duty was due by it to the plaintiff, and for this reason there is no proper allegation of negligence against the Fuller Company, and for that reason the prayer of the Fuller Company to have the verdict directed in its favor should have been granted.

When we come to the evidence we find that the plaintiff requested only the defendant, the Otis Company, to stop the elevator at the second floor, and it is entirely devoid of statement or suggestion, by any witness or in any manner, that the request was made of the Fuller Company or that any one but the Otis Company's operator was running the elevator at the time.

The motion to direct a verdict for the defendant Fuller Company made at the close of the plaintiff's case and again urged at the close of the whole case, in the form of defendant's first prayer (Rec., pp. 42 and 56), was based on the ground that there was no evidence that the plaintiff requested the Fuller Company or any of its servants to operate the elevator at the time of the accident or at any other time and it was not so charged in the declaration. While contributory negligence was also a ground of the motion, that point was never argued and it was not referred to under the said first prayer, but was made the subject of separate instructions prayed for (see prayers 2, 3, and 6). A careful reading of the declaration fixes positively the intention of the plaintiff to charge that he made his request of a servant of the Otis

Company, and by reference to instructions asked for defendant the Fuller Company (see prayers 4, 5 and 7), and the exception noted to the granting of plaintiff's first prayer, it will be understood that this point was prominent in the case and that it was contended that the operator was the servant of either the Otis Company or the Mackay Company, but not of the Fuller Company.

The Court of Appeals held the single count of the declaration sufficient in this regard and based its decision on the assumption that the plaintiff probably did not know the existing relation between the original defendants and so charged negligence on the part of both and a breach of duty on the part of the Fuller Company, referring to the following language: "that said plaintiff * * * requested the said defendant Otis Elevator Company, its servants and employees, to stop said elevator at the second floor * * * but the said *defendants* * * * did so negligently, carelessly, and recklessly operate and cause to be operated said elevator, etc.," which the court said was sufficient. It is submitted that no act of negligence is charged against the Fuller Company, as assumed, and further that the word *defendants* must be construed to mean defendant, singular, in order that it may read consistently with the language quoted, which immediately precedes it. The writing of the word in the plural was evidently a typographical error. Where pleadings are ambiguous or doubtful in meaning, and two different meanings present themselves, that construction shall be adopted which is most unfavorable to the party pleading.

Tyler's Stephen on Pleading, 3d Am. ed., p. 333.

The Court of Appeals further assumed that the sufficiency of the declaration in this regard was not questioned in the trial court and said that if such defect in fact existed it was cured by the verdict. The contrary is shown by the record, where the granting of the plaintiff's first prayer was objected to because the court thereby placed a construction

on the evidence wholly inconsistent with the allegation of the declaration above refererd to.

It is well settled that to entitle a plaintiff to go to the jury the evidence offered in support of his pleadings must conform closely to the allegations thereof.

13 Ency. Pldg. & Pr., 910, and cases cited.
Hetzel *vs.* Railroad Co., 7 App. D. C., 524.
Arrick *vs.* Fry, 8 App. D. C., 125.

It is not alone the fatally defective state of the pleading which made it the duty of the trial court, under the authorities hereinafter cited, to direct a verdict for the Fuller Company as requested, both at the close of the plaintiff's case and at the close of the whole case, but the condition of the evidence also entitled said defendant to a directed verdict. There is a total failure of evidence on the point under discussion.

The defect in the declaration was not cured by the verdict, but advantage may be taken of such defect on error. Under the authorities a distinction is drawn between a defective statement of a cause of action and a statement of a defective cause of action. If the former, it is aided by the verdict; if the latter, advantage may be taken of such defect upon appeal or error.

Western Wheel Works *vs.* Stachnick, 102 Ill. App., 420.

In the case just cited the court said:

> "By pleading over and going to trial the defendant does not waive innate and substantial defects in the declaration. Nor are these cured by the statute of amendments and jeofails."

See also

L. S. & M. S. Ry. Co. *vs.* O'Connor, 115 Ill., 254; 2 Kent's Com., p. 260.

In the case at bar the declaration undoubtedly sets out a statement of a defective cause of action, for the reason advanced, namely, there is no allegation that the plaintiff ever asked the Fuller Company or any of its servants to do anything in connection with the running of the elevator.

While the evidence is consistent with the declaration in this regard, yet if there had been evidence of such a request the defect in the pleading would not have been aided by *intendment after verdict.*

> "It is at all events clear that the courts will never, in order to support a verdict, make an intendment which is inconsistent with the allegations on the record."
>
> Chitty, 9 Am. ed., vol. 1, p. 679.

As to the failure of proof, the sufficiency of the evidence is properly raised by the request for a peremptory instruction, as asked by defendant, and is reviewable on error.

Pa. R. R. Co. *vs.* Jones, 155 U. S., 333.

For emphasis, it is repeated that the allegation of the declaration and the proof are that only the Otis Elevator Company was requested to do a certain thing and executed the order negligently, thereby causing the injury to plaintiff.

The eight assignments of error involve four general propositions. The first, second, and eighth assignments of error are addressed to the rulings of the court below to the effect that as a matter of law Locke, the elevator operator, was the servant of the Fuller Company, and these three assignments may be considered together.

The third assignment of error involves the insufficiency of any allegation in the declaration as tending to show any negligence on the part of the Fuller Company.

The fourth assignment of error involves the discussion of the proposition of contributory negligence of McCloskey in

placing himself in a dangerous position on top of the elevator car.

The fifth, sixth, and seventh assignments of error are addressed to the proposition that the question of Locke's employment as a servant of the Fuller Company should have been left to the jury to decide as a matter of fact.

These four propositions will be discussed in their order.

1.

It was error in the trial court to decide, as a matter of law, under all the evidence, that Locke was the servant of the Fuller Company.

We agree with the court below that there was no conflict in the evidence upon the facts relating to Locke's employment. From the statement of the case already given, it appears that the defendant in error, McCloskey, testified that he had nothing to do with the operator, except to inform him where he wanted to go. To that extent the operator was under his control and direction. He testifies that on the day of the accident he gave the operator his instructions. He also testifies that he was not Locke's boss, but does admit that Locke was to carry the elevator up and down as he, the plaintiff, might direct.

Renner, the painter who was on the car with McCloskey when the latter was injured, testifies that McCloskey gave Locke orders to raise the car to the second floor. He says that on the day of the accident they rode up and down on the elevator car quite often.

Scott, the manager of the Otis Company, says that it was the Otis Company that supplied the man to run the elevator and to care for the machine, and that the operator was paid by the Otis Company. He says that Locke was carried on the time books of the Otis Company; that Locke was continued in the service of the Otis Company until the elevators

were turned over to the owner. He says that the arrangement between the Otis Company and the Fuller Company related only to the use of the makeshift elevator. The Otis Company was responsible to the owner for turning over the elevators in a satisfactory condition, and the Otis Company did not want the Fuller Company to put on an inexperienced man. Locke was employed by the superintendent of the Otis Company, who was supposed to pass upon his qualifications. He says that there was no question that Locke was in the service of the Otis Company at the time of the accident, and at that time could not have been discharged by the Fuller Company. The Fuller Company had no authority to discharge him; they had no authority to take Locke off of the machine and substitute another operator. The Fuller Company had nothing to do with the selection of Locke at the time of the accident or at any other time.

It further appeared from the evidence that the contract between the Fuller Company and the Mackay Company provided in substance that the Mackay Company should do all of the painting in the Hibbs Building and provide all the materials necessary for the performance of their work.

The witness Robert E. Mackay testified that the labor required under his contract was employed and paid for by the Mackay Company; that in doing their work on the Hibbs Building the Mackay Company used the elevator as they always did in large buildings, and the general contractor charged therefor, as is the usual custom in this class of work. He says that the elevator was not operated by an employee of the Mackay Company, but that while the Mackay Company had the elevator in use nobody else had the right to use it. He supposed that the Mackay Company's painters, while working on the top of the elevator, directed its movements and told the operator to go up and down. He says that he did not hire the operator, had no control over him and no right to discharge him, but that he

had the right to direct the operator where to stop and when to go on, to suit the convenience of his workmen. He also testified that the only persons who could direct the movements of the operator were the plaintiff, McCloskey, and the other men on the elevator, and the foreman of the Mackay Company.

The witness Robert Minte, Mackay's foreman, testified that he had an arrangement with the manager of the Fuller Company by which Minte was to use the elevator while the shaft was being painted, and that Minte was to turn the elevator back to the Fuller Company whenever they had any material to carry up. The hiring from the Fuller Company included everything, machine, operator, electric current, and everything necessary to run the elevator. His arrangement with Baird, the manager of the Fuller Company, was that when the Mackay Company had the elevator they had the *exclusive use* of it, the only exceptions being when the Otis Company required it or the Fuller Company wanted to haul materials up the shaft. *The Mackay Company had the use of the elevator, the operator, power, and everything.*

This was all the proof introduced by the plaintiff below on this particular question.

Additional light is thrown on it however by the testimony introduced by the Fuller Company. Mr. Fisher, superintendent of that company, testified that he never employed Locke, but that Locke was employed by the Otis Company and paid by that Company. He testified that at the time of the accident the elevator was being used by Mackay, and while used by that company Locke was under the orders of the Mackay Company. Fisher informed Locke that he must take his orders from Minte, or from Minte's representative, when Mackay was using the elevator. No supervision over Locke was exercised by the Fuller Company and no orders given him by the Fuller Company. Whenever the Mackay Company wanted to use the elevator, Fisher would ask Minte for it and then Minte would turn it over,

but while Mackay was using the elevator neither Fisher nor the Fuller Company had any control.

Gormley, the general superintendent of the Fuller Company, testified that he knew that the Mackey Company used the passenger elevator for hoisting paints to the fifth floor and used the elevator for other work; that Locke was employed by the Otis Company and paid by that company; that the Fuller Company had no control over Locke and no right to discharge him, or to substitute some one else for him.

Baird, the manager of the Fuller Company, testified that Minte, Mackay's foreman, came to see him about the use of the elevator. He informed Minte that he could have the elevator under the customary arrangement. Baird told Minte he could have the elevator and everything that went with it, and that while the Mackay Company had the elevator that company had the *exclusive use* of it. The Mackay Company *rented the elevator, for its service, and the operator,* and paid for it.

Locke himself testified that he was employed by the Otis Company and had been continuously employed by that company for five months before the accident and continued for four months after the accident. On the morning of the day of the accident Locke was informed that the painters would use the elevator as they had done before. During these operations Locke testified that he had been receiving orders from McCloskey, and moved the car up and down as McCloskey directed. On the day of the accident Locke testified that he received all of his orders from McCloskey, including the movement of the elevator up and down; that in doing this work for the Mackay Company neither Fisher, the Fuller superintendent, nor Gormley, its general superintendent, attempted to interfere with him, Locke, in any manner.

This was substantially all the evidence in the case upon this proposition, and the situation may be briefly summarized as follows:

Mr. Hibbs employed the Fuller Company to construct the building in question, with the exception of the installation of the elevators, which work was done under a separate contract entered into between the owner and the Otis Company. The Otis Company furnished the electric power to run the elevator, kept the elevator in condition, and employed the operator to run it. For purposes of convenience, the Otis Company agreed to hire the elevator, with the equipment and its operator, to do certain work for the Fuller Company, for which the Fuller Company paid.

On this state of the evidence the courts below took the view that that was a transfer of Locke from the service of the Otis Company into the service of the Fuller Company for the time being. This was in utter disregard of the absence from the declaration of any proper averment which would admit of such construction being put upon the evidence, was directly opposed to the allegation therein that the Fuller Company employed the Otis Company to do the work and that the plaintiff requested the latter company or its *employees* to do the thing, the negligent doing of which caused the accident, and did not request the Fuller Company or any of its employees to do that thing, and a fatal variance was created by such ruling of the trial court, when it granted the plaintiff's first prayer. The court having created the variance, and the defendant having objected to the prayer on that ground and reserved its exception, the question of variance on this ground was fully argued before the Court of Appeals and is properly before this court under the 1st and 3d errors assigned.

For the purpose of argument, however, let us assume that the declaration permits, by its averments, such construction to be placed upon the evidence, and that that is the fact and the law. It is undisputed that the Fuller Company in turn made a precisely similar arrangement with the Mackay Company by which for a consideration it turned over or hired the same elevator, equipment, and operator to the Mackay Company for the purposes of Mackay's work.

Why the same rule of law should not be applied to the Mackay Company as was applied by the courts below in the transfer from the Otis Company to the Fuller Company is difficult to comprehend. The fact is undoubted, however, and there is no denial of it, that the Mackay Company hired from the Fuller Company this entire equipment, and there is no line of evidence in the entire record to justify or substantiate or support the allegation in the declaration that the Fuller Company agreed to run and operate the elevator for the benefit of the Mackay Company. The allegation of the declaration in this regard appears at page 2 of the record, and it is there stated that "the said George A. Fuller Company entered into an agreement with said Robert E. Mackay, for hire, to operate said elevator so that said company's employees might stand on top of the elevator, and that it might be lowered or raised as was necessary in the painting of said shaft, and to start and stop said elevator whenever and wherever requested by this plaintiff."

The real question, under the suggested assumption, would be as follows:

In moving the elevator up and down the shaft for the accommodation of the Mackay Company, in the performance of its work, in whose service was Locke engaged? Who controlled and directed his movements? Whose work was he doing?

In the case of Standard Oil Co. *vs.* Anderson, 212 U. S., 215, the court, in considering this question, says, at page 221:

> "It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a con-

> sideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are, for the time being, his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still, in its doing, his own work. To determine whether a given case falls within the one class or the other, we must inquire whose work is the work being performed—a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work."

Locke unquestionably was engaged in doing the work of the Mackay Company. He unquestionably was subject to the orders and directions of Mackay's painters, and we submit beyond any possible question that at the time of the accident he was the servant of the Mackay Company. If not the servant of the Mackay Company, then he must have been the servant of the Otis Company.

In the case of Byrne *vs.* Kansas City, Ft. S. & M. R. R. Co., 61 Fed. Rep., 609, the facts as stated in the opinion of Taft, Circuit Judge, were:

> "The bridge company rented the engine from the railroad company at ten dollars ($10) a day, and also paid the railroad company the expense of the fuel and supplies used in the running of the engine and the wages of the engineer and fireman, who were carried on the pay-rolls of the railroad company. The bridge is used by several different railroad companies. The switch engine pushes all trains over it, and thus gives assistance to the regular engines of the railroad companies on the heavy grades of the apparatus. The engineer and fireman were subject construction company agreed to furnish push-cars, locomotive, flats, and engineer and fireman and one brakeman to be used and controlled by the sub-

contractor in doing this work. The inference from the contract was that the engineer, fireman and brakeman were to be paid by the construction company. The plaintiff was injured by reason of the negligence of the fireman furnished by the construction company in running the engine. It was held that in so doing the fireman, though paid by the construction company, was the servant of the subcontractor, and that the construction company could not be held liable for his negligence."

See also—

Powell *vs.* Construction Co., 88 Tenn., 692; 13 S. W., 691.

The following cases, most of which are discussed and cited with approval in Standard Oil Co. *vs.* Anderson, *supra*, are believed to be in point on the question under present discussion, and support our contention that the facts in the case at bar constituted a transfer of Locke to the special employ of the Mackay Company if in following out the foregoing assumption he was to be viewed as the employee of the Fuller Company. If there was not such transfer, then, the situation being similar with regard to the Otis Company and the Fuller Company, there was no transfer of Locke from the former to the latter's special employ, and the Fuller Company cannot be held liable.

See—

The Elton, 142 Fed. Rep., 367.

Rourke *vs.* White Moss Colliery Co., L. R., 2; C. P. D., 205.

Murrie *vs.* Currie, L. R., 6; C. P., 24.

Donovan *vs.* Construction Syndicate, 1 Q. B. (1893), 629.

Wylie *vs.* Palmer, 137 N. Y. Rep., 248.

McInerney *vs.* Del. & Hud. C. Co., 151 N. Y. Rep., 411.

Delory *vs.* Blodgett, 185 Mass., 126.

D., L. & W. R. Co. *vs.* Hardy, 59 N. J. L., 35.

Parkhurst *vs.* Swift, 31 Ind. App., 521.

Anderson *vs.* Boyer, 156 N. Y., 93.

In the case at bar, by the arrangement between the Fuller Company and the Mackay Company, the former relinquished to the latter the elevator and the operator to do its work and the man, by the agreement, was placed under the exclusive control of the Mackay Company in the performance of it. The Fuller Company did not agree to do the work for the Mackay Company and did not exercise nor retain control nor direction of Locke in the performance of his work for the Mackay Company. By applying the rule above laid down by the Supreme Court the only conclusion to be arrived at is that while Locke was doing the work in question he was the servant of the Mackay Company and hence a fellow-servant of the defendant in error.

The facts of the Anderson case, *supra*, are materially different to those of the case at bar. In that case the only element of direction or control exercised by the stevedore's employees over the winchman employed by the Standard Oil Company was in regard to signals. It was urged that this was evidence tending to prove that for the time being the winchman was transferred from the general employ of the Standard Oil Company to the special employ of the stevedore. There was no evidence other than this of the intention of the parties that the winchman should be so transferred. The element of signals is not the only one in the case at bar. There are present these factors, which differentiate the two cases, and, in our judgment, conclusively prove the transfer of Locke, the elevator operator, from the special employ of the Fuller Company (which is assumed for the purpose of this argument) to the special employ of the Mackay Company, namely, the contract between the two mentioned companies, whereby in painting the building and elevator shafts the latter was required to supply all the labor and materials (Rec., p. 32) and the supplemental agreement for the use of the elevator, whereby it was agreed between the two said companies that the Mackay Company, while doing the work of painting the shaft, was to have the *ex-*

clusive use of the elevator, the operator, and everything that went with the elevator for a stipulated sum. The record shows that this was the customary business method of the Mackay Company to provide means for carrying out contracts for the painting of all large buildings where an elevator was available (Rec., p. 35).

A similar state of facts was presented in the case of Connor *vs.* Koch *et al.*, 63 App. Div. (Suprm. Ct. N. Y.), 257, and it was held that the elevator operator was the servant of the subcontractor, where it was given the exclusive use of the elevator. The court in that case said, *inter alia:*

> "The court also erred in excluding the evidence offered by appellants to show that Baumann had, for the day in question, become detached from their employment and entered the employ of the fire-extinguisher company or of its foreman, Murphy. Under their contract with the General Fire Extinguisher Company appellants were under no obligation to carry this pipe in their elevator, nor was it their duty when they consented to allow the use of their elevator for that purpose to furnish a man to operate it. If the evidence excluded had been admitted, it might have been shown not only that Baumann's (operator) services for that day were paid by Murphy or the General Fire Extinguisher Company, but that he performed no services for appellants, and that at the request of Murphy or his company, Baumann was permitted and instructed by appellants to act upon the orders of Murphy or his company, and this would have relieved appellants from liability for his negligent acts while so employed," citing Hallett *vs.* N. Y. C. & H. R. Co., 167 N. Y., 543; Wylie *vs.* Palmer, 137 *Id.*, 248; Murray *vs.* Dwight, 161 *Id.*, 301; Kneckel *vs.* Ryder, 54 App. Div., 252; Higgins *vs.* Western Union Tel. Co., 156 N. Y., 75.

The uncontradicted, undisputed evidence in the case at bar is, that the Mackay Company was given the *exclusive use* of the elevator and that Locke had, for the day in question, become detached from the employment of the Fuller

Company (if it be assumed that he was in their special employ) and entered the employ of the painting company; that his services were paid for by the Mackay Company; that he performed no services for plaintiff in error, and that Locke was permitted and instructed by the plaintiff in error to act upon the orders of McCloskey or his company; and, furthermore, that under its contract with the Mackay Company for painting the building, plaintiff in error was under no obligation to supply the elevator or any other means for painting the elevator shafts, nor was it their duty when they consented to the use of the elevator for that purpose to furnish a man to operate it. Baird, manager for the Fuller Company, and Minte, foreman for the Mackay Company, testified that the agreement for the use of the elevator specified the *exclusive use;* Mackay testified that his company had the *exclusive use* of it. Locke's (the operator) evidence was to the same effect, and Fisher, the superintendent of work for the Fuller Company, testified that he told Locke he was to work for the painters and take his orders from them on the day in question. Gormley, general superintendent for the Fuller Company, testified that the Mackay Company not only used the elevator for painting the shafts, but also for hauling their materials up to the fifth floor where the painters had a storeroom. All of this was the Mackay Company's work, under its contract, and not the work of the Fuller Company.

See also—

Ches. & O. Ry. Co. *vs.* Howard, 178 U. S., 153.

There is a limitation to the extent of the rule that a master is answerable for the wrongs of his servant, which bears strongly upon the question whether Locke can be held to have been in the employ of the Fuller Company, and this limitation is laid down in the case of Guy *vs.* Donald, 203 U. S., 399. The court in that case, by Holmes, J., says:

> "But there is always a limitation. (For instance, speaking when one man is answerable for the tort of another.) It is true that he is not excused by care in selection or orders sufficient to secure a right conduct, if obeyed. But when he could not select, could not control, and could not discharge the guilty man, he does not answer for his torts. As a familiar instance, the servants of an independent contractor are not the servants of the contractor."

In the case at bar the Fuller Company had no right to select nor control the operator for the elevator and could not have discharged him nor substituted another in his place at any time, whether doing work for it or for the Mackay Company. Whatever rights it received from the Otis Company were relinquished without diminution to the Mackay Company.

These considerations cover the first, second and eighth assignments of error.

2

There is no sufficient allegation of negligence against the Fuller Company in the declaration nor is there evidence to support a verdict against that company.

By its first prayer, appearing at page 56 of the record, the court below was requested by the Fuller Company to instruct the jury that under the pleadings and all the evidence their verdict should have been for the defendant The Fuller Company. This prayer was refused by the court and the affirming of such refusal is assigned for error.

On this proposition the court's attention is called to the only averment of negligence contained in the declaration. At the top of page 3 in the record the declaration avers "that the plaintiff on the day aforesaid had finished his work, he then being on the top of the said elevator, below the second floor, and requested the said defendant, The Otis

Elevator Company, its servants and employees, to stop said elevator at the second floor so that he might get off and alight therefrom, but the said defendants not regarding their said duties in the premises, did so negligently, carelessly, and recklessly operate, and cause to be operated, said elevator, that the same was carried up to the fifth floor where the said weights and elevator meet, as aforesaid, in direct violation of the request of the plaintiff to stop the same at the second floor."

There is no allegation that the plaintiff ever requested any employee of the Fuller Company to do the thing, the omission to do which is charged as the cause of the plaintiff's injury. In this condition of the record the court below was asked to say that neither the pleadings nor the proof justified a finding of negligence against the Fuller Company. For this reason alone we submit that the judgment should be reversed.

There are only two constructions to be placed upon the averments of the plaintiff's declaration, namely, that the relation between the two defendant corporations was either that of contractor and sub-contractor, or master and servant, and the evidence adduced at the trial was presumably presented upon one of these theories. Considering the first construction, it will be noted from a reading of the declaration that the claim is that after the alleged agreement between the Mackay Company and the plaintiff in error, whereby the latter is charged with undertaking to operate the elevator so that the former company's employees might stand on top and paint the shaft, the plaintiff in error, to quote the language of the declaration, "employed the Otis Elevator Company to run and operate the said elevator, to start and stop the same at such times and at such places during the time that said elevator shaft was being painted as this plaintiff or any other employee of said Robert E. Mackay Company, who might be engaged in the painting of said shaft, might designate" (Rec., p. 2), and further along on the same page,

"and it then and there became the duty of the said defendant Otis Elevator Company to execute the requests of the plaintiff's firm or any of its employees engaged in said work, among whom was the plaintiff, and especially not to start said elevator, or if started not to carry the same beyond the point designated;" and then follows the allegation that the plaintiff requested the said defendant Otis Elevator Company, its servants and employees, to stop said elevator at the second floor, the failure to do which caused the injury to the plaintiff. There is no allegation that the plaintiff in error reserved or exercised the right to direct and control the Otis Elevator Company or its employees in the method or means of doing the work above designated, nor is there a line of proof in the record which shows that such direction and control was exercised.

If, then, we consider the evidence in the light of this theory, we have a case presented of independent contractors, with no allegation nor proof that the plaintiff in error retained the right to determine the means or manner of accomplishing the object of the alleged contract with its subcontractor, the Otis Elevator Company. The failure in this regard completely absolved the plaintiff in error from liability, and if any existed it rested upon the other defendant, the Otis Company.

In an early decision this court has held that it is an important test of liability whether "the company reserve the power not only to direct what shall be done, but *how it shall be done.*" Railroad Co. *vs.* Hanning, 15 Wall. (U. S.), 649, See also the case of Singer Mfg. Co. *vs.* Rahn, 132 U. S., 518, and cases cited therein.

In discussing this question the late Mr. Justice Brewer, speaking for this court, said in the case of Casement *vs.* Brown, 148 U. S., on page 622:

> "They selected their own servants and employés. Their contract was to produce a specified result. They were to furnish all the material and do all the work, and by the use of that material and the means

of that work were to produce the completed structures. The will of the companies was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the companies, the contract provided for their daily supervision and approval of both material and work."

See B. & O. R. R. Co. *vs.* Baugh, 149 U. S., 368.

Other cases in point are:

Morgan *vs.* Smith, 159 Mass., 570.
Geer *vs.* Darrow, 61 Conn., 220.
Charlock *vs.* Freel, 125 N. Y., 357.
Bailey *vs.* Troy & B. R. Co., 57 Vt., 252.
Johnston *vs.* Ott, 155 Pa. St., 17.

If an independent contractor is employed to do a lawful act, and in the course of the work his servants commit some casual act of wrong or negligence, the employer is not answerable.

2 Kent Com., p. 260.
Reedie *vs.* London & N. W. R. Co., 4 Exch., 244-256.
Overton *vs.* Freeman, 11 C. B., 867.
Gayford *vs.* Nichols, 9 Exch., 702, 707.
Peachy *vs.* Rowland, 13 C. B., 182.
Forsyth *vs.* Hooper, 11 Allen, 419.
Hilliard *vs.* Richardson, 3 Gray, 349.
Blake *vs.* Ferris, 1 Seld., 48.
Pack *vs.* New York, 8 N. Y., 222.
De Forrest *vs.* Wright, 5 Mich., 368.
Painter *vs.* Pittsburgh, 46 Penn. St., 213.
Eaton *vs.* European & N. A. R. Co., 59 Me., 520.
McCarthy *vs.* Second Parrish, 71 Me., 318.
Cunningham *vs.* International R. R. Co., 51 Tex., 503.
King *vs.* N. Y. Cent. R. Co., 66 N. Y., 181.

In the case of Schnurr *vs.* Board of Com'rs of Huntington Co., 53 N. E., 425; 22 Ind. App., 188, it was held that

> "The relation of master and servant does not exist between a county board of commissioners and the servants of a contractor, where the board has no control over them."

In the case of Sullivan *vs.* New Bedford Gas & Edison Light Co., 76 N. E., 1048; 190 Mass., 288, it was held that

> "A stevedore who is paid so much a ton for unloading coal from a vessel, and who hired, discharged, paid and had charge of the men who did the work, was an independent contractor."

In the case of Hooe *vs.* Boston & N. St. Ry. Co., 187 Mass., 67; 72 N. E., 341, the court said:

> "In a contract, made by a contractor with a street railway company for laying a certain line of track, a provision that the work shall be 'subject to the direction and acceptance of the engineer' of the railway company does not give the engineer any right of control or direction as to the execution of the work after indicating to the contractor what work is to be done and what materials are to be furnished, his only further right being to determine whether the work done by the contractor is acceptable, and the workmen employed are servants of the contractor and not of the railway company."

In Laugher *vs.* Pointer, 5 B. & C., 560; 12 E. C. L., 316, Littledale, J., remarked, as to one employed by a contractor,

> "that he was the servant of one or the other, but not the servant of the one *and* the other, since the law does not recognize a several liability in two principals."

In this connection see also—

Reedie *vs.* London, etc., R. Co., *supra.*

Clark *vs.* Hannibal, etc., R. Co., 36 Mo., 202.

Houser *vs.* Met. R. R. Co. (Supm. Ct., App. T.), 27 Misc. (N. Y.), 538.

Blake *vs.* Ferris, 5 N. Y., 48; 55 Am. Dec., 304.

Since the relation between parties which renders one liable to third persons for the acts of negligence of the other must be that of superior and subordinate, and is based on the control which the superior has the right to exercise over the acts of the subordinate in the performance of his duties, it follows that an employer is not so liable for the acts of an independent contractor, who is never subject to such control, nor is he liable for the acts of the employees and servants of such independent contractor. That this is the law is now generally conceded both in England and the United States.

Casement vs. Brown, *supra.*

Robbins *vs.* Chicago, 2 Black (U. S.), 418, and 4 Wall. (U. S.), 657.

That rule of law is recognized in the following additional cases:

"Where the owner of a piece of land makes a contract with a firm to excavate it and contractors sublet to another, and subcontractor, in blasting, injures adjoining property, an injunction will not lie against aforesaid owner as he has no right of control over action of subcontractor."

Hill *vs.* Schneider *et al.* (N. Y., 1897), 13 App. Div., 299.

"Independence of control in employing workmen and in selecting means of doing work is the test usually applied by courts to determine whether contractor is independent or not."

Uppington *vs.* City of N. Y. (N. Y., 1900), 165 N. Y., 222.

Where defendants, owners of buildings, employed a competent independent contractor to repair chimneys of their buildings, who was to do work without defendants' supervision over details or manner of work they were not liable to person injured on street by falling bricks caused by contractor's negligence.

Boomer *vs.* Wilbur (Mass., 1900), 176 Mass., 482.

Where defendant hired a painter to paint his house, without giving any instructions as to method to be employed and to pay a lump sum therefor, and painter used a blowpipe or torch that set the house on fire that was communicated to plaintiff's house and barn and destroyed same, defendant was not liable, as painter was an independent contractor.

Francis *vs.* Johnson, (Iowa 1904), 127 Iowa, 391.

In the case at bar we have a declaration with no proper allegation which would remove it from the operation of the rule laid down in the foregoing authorities, and when we come to examine the evidence adduced at the trial we find no support for such an allegation if it were present. The reason for its absence from both declaration and proof becomes apparent from a reading of the evidence bearing on the relations of the two defendants below and especially the conduct of the plaintiff in error to the employees of the Otis Company. The uncontradicted, undisputed testimony is that the latter furnished the elevator service and the plaintiff in error was only permitted to indicate to the employees of the Elevator Company what it wanted done. No control, no supervision, of the means or method of doing it was contemplated between the parties nor allowed. Furthermore, as the court said in the case of C. & E. I. R. Co., *vs.* Argo, 82 Ill. App., 667, "As appellant was not so charged in the declaration no such issue was before the jury."

Under the authorities such a showing was wholly insufficient to justify the trial court in submitting the case to the jury under the theory just considered, and it should have granted the defendant's first prayer, namely, for a directed verdict, unless the case could be submitted under the other theory to be discussed.

Coming now to the other construction of which the allegations of the declaration are susceptible, and the theory consistent therewith, under which evidence was admissible, namely that of master and servant relation between the

Fuller Company and the Otis Elevator Company, it is submitted that no recovery could be had, under the authorities hereinbefore cited, and the case should never have been given to the jury. There was neither allegation nor proof that the Fuller Company retained or exercised direction or control of the Otis Company while it was working for the Mackay Company's painters, and without such proof the relation of master and servant cannot be said to exist. Furthermore the trial court had already ruled that the plaintiff had failed to make out a case against the Otis Elevator Company (Rec., p. 41), so if the plaintiff's proof was adduced upon the theory, under the foregoing construction of the declaration, that the Otis Company was the servant of the Fuller Company, then it follows, that having failed to prove negligence on the part of the servant as alleged, there was nothing to submit to the jury as to the master, the Fuller Company. The action is trespass on the case, as is necessary where the master is not directly the tort-feasor, hence if the servant who is charged with negligence be adjudged not guilty of the alleged wrong-doing, there is nothing to hold the master liable for. And it is to be noted that in this declaration both the supposed master and its servant are charged jointly, but the servant only is charged with the act of negligence.

When the trial judge ruled at the close of the plaintiff's case that no negligence, as alleged, was proven against the Otis Company, he placed a construction on the evidence which rendered it without probative force to support a verdict against the Fuller Company. The motion to direct a verdict in favor of the latter, following immediately after that ruling, should have been granted. This motion was renewed at the close of the whole case, in the form of defendant's first prayer, and, it is submitted, that with the absence of proof pointed out, it was error to refuse this prayer.

Furthermore there was no proof of the alleged agreement between the plaintiff in error and the Mackay Company whereby the former, to quote the language of the declaration,

"entered into an agreement, for hire, to operate said elevator, so that said company's (Mackay Company) employees might stand on top of the elevator," etc., and the proof shows that the plaintiff in error made no such agreement, but turned over to the Mackay Company, for use by the hour, all the rights which it had in connection with the elevator service furnished by the Otis Company.

The burden of proof was on the plaintiff to show that the defendant entered into the contract alleged.

Pa. R. R. Co., *vs.* Jones, 155 U. S., 333.
Tyler *vs.* Pa. R. R. Co., 18 App. D. C., 31.

The foregoing are the only theories of the plaintiff's case under which evidence could be admitted, and it is submitted that there was a failure of essential proof under either. And this failure was fatal to the right of the plaintiff to recover. Consequently the evidence did not support the verdict rendered. The theory under which the trial judge did submit the case to the jury was wholly inconsistent with the allegations of the declaration. This has already been referred to under subhead 1.

3.

It was McCloskey's duty while on the elevator to exercise proper care for his own safety, and the court erred in refusing to grant the ~~appellant's~~ defendant's third prayer in that behalf.

By this third prayer the trial court was asked to tell the jury that if they found from all the evidence that the accident was occasioned wholly or in part by reason of the fact that McCloskey had placed himself in an exposed and dangerous position on the top of the elevator car, when he might readily have placed himself in a safe and secure position, then the verdict should be for the defendant, the George A. Fuller Company, regardless of any supposed negligence on the part of the elevator operator, and regardless of whether

the operator was a servant of the Fuller Company or not. This prayer, as requested, was refused and exception duly noted.

The court, of its own motion, modified or amended the prayer so as to insert the words appearing in italics on page 56 of the record, those words being as follows: "with reference to obeying the signals to stop at the second floor, if you find such signals were given."

It is respectfully submitted that the prayer as requested stated the law correctly, that is to say, if the plaintiff placed himself in a dangerous position on top of the car, so as to subject himself to possible or probable injury, and his action in so exposing himself contributed wholly or in part to the accident, then he was not entitled to recover.

The trial court modified this prayer by inserting the objectionable language referred to. The *plaintiff* (defendant in error) was not required to obey any signals given to stop at the second floor. He was the person who gave the signals. The operator did not give any signals, and the plaintiff was not required to obey any signals of the operator. The language is misleading, confusing, and, we respectfully submit, vitiates the whole prayer, or at least it is accurate to state that the court erred in refusing to grant the prayer as given. It is difficult to comprehend what the prayer exactly means in the form in which the court granted it.

The evidence tends to show that McCloskey was standing on the ledge, near the middle thereof and directly in the path of the descending weights. His own statement was that he was standing on the ledge, which is on the top of the elevator near the weights, but with his feet crowded in the small space of 17 inches, measured from the front of the top to the nearest part of the weights. At another time he said he just finished his work where he stood, and as he had only a few feet to go told Locke to take him up there (Rec., p. 11). A man's feet, when aligned as McCloskey testified, would occupy more space than 17 inches. Locke stated that he saw McCloskey standing back further when

the elevator was at the first floor, and when he assisted in removing him from the top, after the accident, he was in about the same place (Rec., pp. 52 and 53). This would indicate that McCloskey was not standing near the front of the elevator, but was nearer the middle, and this is borne out by the evidence of Doctors Leech and Wellington, both of whom stated that it would have been impossible for him to have received injuries such as he did, if his right foot had been pointed in the direction of the front of the elevator and the weight had struck his heel on the side. They testified that in order to receive such injuries his right foot must have been squarely at a right angle to the weight (Rec., p. 54). And his foot was found in this position by Locke, when caught in the weight (Rec., p. 52).

He was in a position of danger at either place and it must have been obvious to him, as he was well acquainted with the construction in this elevator-shaft and with the location of these weights. He knew the proximity of the weights to the side of the elevator, and that they passed the same near the fifth floor. He had been painting in this shaft for more than a month (Rec., pp. 10, 14, and 16).

He was repeatedly warned of the danger of the weights before the elevator started, but disregarded the warning (Rec., p. 51). If he had placed himself anywhere else on the top of the elevator—on the dome, on the cross-bars, or on any of the other three ledges, as did Renner—he would not have been harmed (Rec., pp. 17, 43, 45, 50, and 53). Commenting on a similar act of negligence on the part of a plaintiff, this court, in the case of Railroad Co. *vs.* Jones, 95 U. S., 443, said:

> "The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cow-catcher, and obviously a place of peril, especially in case of collision. There was room for him in the box-car. He should have taken his place there. * * * He and another man who rode beside him were the only persons hurt upon the train. All those in the box-car, where he should

> have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down."
>
> "The plaintiff was not entitled to recover. * * * It follows that the court erred in refusing the instruction asked upon this subject. If the company had prayed the court to direct the jury to return a verdict for the defendant, it would have been the duty of the court to give such direction, and error to refuse."

The court's attention is directed to the position of McCloskey's feet which he assumed when he called to the operator "already" (Rec., pp. 14-15). They were crowded in a space seventeen and a half inches wide and clear of the path of the counterbalance weights. It is submitted that this was indicative of an intention to go up beyond the second floor and to a point where he would naturally expect to pass the weights. If he did not by this act indicate such intention why was he so particular about his feet. On an ascent to the second floor only, the weights would not have reached down to the elevator, and he could safely have stood directly in the path of the weights without fear of contact.

4

Assuming that there was any evidence tending to show that Locke was the servant of the Fuller Company, the question should have been submitted to the jury to decide under all the evidence under proper instruction.

This proposition embraces the fifth, sixth, and seventh assignments of error. Our contention below was, and our contention now is, that under the undisputed evidence

Locke was not the servant of the Fuller Company at the time the accident in question occurred. Our main contention is that he was the servant for the time being of the Mackay Company, and if not, then he must have been the servant of the Otis Elevator Company, but that in no view of the case could he be considered a servant of the Fuller Company, in that the Fuller Company was responsible for his conduct, because they controlled and directed his work. If there is any evidence in the record tending to show that he was engaged in the work of the Fuller Company, there is certainly an abundance of evidence, as shown by the statements of fact heretofore set forth, that he was equally the servant of the Mackay Company or the servant of the Otis Company, and in view of this condition of the evidence the question certainly, to say the least, should have been submitted to the jury for its determination.

This case presents a proposition of the most vital importance. The case is important not only to the injured man, not only to the plaintiff in error by reason of the large amount of damages awarded by the jury, but the decision of the questions involved will affect construction operations all over this country, where similar conditions arise almost daily. It is probably the case that no large building is ever constructed in this District or elsewhere where the conditions that brought about the accident complained of do not exist. It is of the highest importance to the plaintiff in error and similar building construction companies, who under modern building conditions sublet a large part of the work to specialists in painting, woodworking, plumbing and so forth, and should not be liable under circumstances like those of the case at bar, for injuries to subcontractors' employés, due to the manner or means of doing the work by said specialists; and it is equally important to the public that the responsibility for personal injury or death occurring in large building operations shall be placed where it properly belongs. While the decision of this court in the Standard

Oil *vs.* Anderson case may be strongly relied on by the defendant in error, and is cited in this brief as authority on one point, yet the facts there were in many respects dissimilar to those of the case at bar, and certainly there are several questions raised by the present record which were not involved in that case, and it will be observed that there the questions of negligence were all submitted to the jury under proper instructions.

In the case of Driscoll *vs.* Towle, 181 Mass., 416, opinion delivered by Holmes, C. J., now a justice of the United States Supreme Court, it was held that there was evidence to go to the jury that the driver remained the servant of the defendant. In the case at bar the question whether Locke became the servant of the Mackay Company was not submitted to the jury to be determined from all the facts and circumstances surrounding his employment, but was decided as a question of law by the court, which it is submitted was error.

See also D., L. & W. R. Co. *vs.* Hardy, *supra.*

See also Daley *vs.* Boston & Albany R. Co., 147 Mass., 101.

It is believed that the facts in the case at bar are so nearly like those of Connor *vs.* Koch, 63 App. Div. (Sup. Ct. N. Y.), 257, hereinbefore cited, that the principle there laid down should apply here.

For the foregoing reasons it has been deemed advisable to present the case at what might otherwise appear unreasonable length.

It is respectfully submitted that, upon these considerations, the judgment of the Court of Appeals should be reversed with directions to remand the case for a new trial.

EDWARD S. DUVALL, JR.,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

No. 176.

GEORGE A. FULLER COMPANY, *Plaintiff in Error,*

vs.

WILSON A. McCLOSKEY, *Defendant in Error.*

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This case comes to this court upon a writ of error to the Court of Appeals of the District of Columbia. The action, which was originally instituted in the Supreme Court of the District of Columbia, is one of tort brought by Wilson A. McCloskey against the George A. Fuller Company and the Otis Elevator Company, to recover the sum of $10,000, for personal injuries.

The facts out of which the action arose are as follows:

On September 22, 1906, William B. Hibbs entered into an agreement in writing with the George A. Fuller Company whereby the latter undertook, for a consideration therein recited, to erect for the former the building now known as 723 Fifteenth St., N. W., in this city. Under the terms of this contract the company was to be paid the actual cost of the work and materials required for the construction of said building, plus eight (8%) per cent thereof for its supervision. The building was to be completed within ten months from the date of the contract. (Rec., pp. 47, 48). This contract did not provide for the installation of elevators in the building, that branch of the work

being covered by an independent agreement made later between the said Hibbs and the Otis Elevator Company. On August 19, 1907, the Robert E. Mackay Company, of New York City, contracted in writing with the George A. Fuller Company to perform the painting work required in said building. (Rec., pp. 32-5.) McCloskey was a journeyman painter in the employ of the Mackay Company. The accident resulting in the injury to the plaintiff occurred August 9, 1907. At that time the building was very nearly completed. The painting work was not finished and there remained some interior details still uncompleted. The elevators had been entirely installed and had been for some weeks used by the George A. Fuller Company for hoisting its material to the upper floors of the building, and had also been operated by it for the Robert E. Mackay Company and the Botsford-Dickinson Company. (Rec., pp. 44-5.)

McCloskey at the time of his injury was engaged, in company with another painter, Renner, in painting the walls of the elevator shaft. The testimony showed that there were three methods by which this branch of the painting work might have been done. The first was by constructing a scaffold from the bottom of the shaft from which the painters could work; second, by a swinging scaffold; and third, by using the top of the elevators as moving platforms. (Rec., p. 39.) The first and second methods were impracticable in the present case for the reason that it would have prevented the operation of the elevators, thereby inconveniencing everyone in the building. (Rec., p. 39.) There is no evidence in the record, as claimed in appellant's brief, as to whether the swinging scaffold would have been more expensive to the Robert E. Mackay Company than the use of the elevators. Under the agreement above mentioned for the installation of the elevators, they were to remain the property of the Otis Elevator Company until formally turned over by them to the owner, and which up to that time had not been done. This precaution was taken for obvious reasons. It developed during the progress of the trial that some weeks prior to the happening of the acci-

dent the Otis Elevator Company had hired an operator, Locke, for three dollars per day, to the George A. Fuller Company, to operate the elevators. It did not furnish the electric power to operate the elevators nor hire them to said company, as is claimed in the Brief of Plaintiff in Error, but permitted said company to use the elevators without charge. (Rec., pp. 20-23.) The George A. Fuller Company had no arrangement with the Otis Elevator Company for the use of the elevators, it being customary for the builder to use the elevators for the benefit of all desiring them, and to charge one dollar an hour for such use. (Rec., pp. 49-50.) There was no conflict in the evidence as to the arrangement between the Otis Elevator Company and the George A. Fuller Company as to the hiring of Locke. About two months before the Mackay Company started to paint the elevator shaft, Robert Minte, who was the foreman of the Mackay Company, called upon James Baird, the local manager of the George A. Fuller Company, to arrange for the use of the elevators in painting the elevator shaft. There is also no dispute in the testimony as to what this agreement was, the testimony of Minte and Baird being identical upon the subject. (Rec., pp. 36 and 37, 49 and 50.) The George A. Fuller Company was to furnish to the Mackay Company at one dollar an hour (Rec., pp. 35 and 49), the use and operation of the elevators for the purpose of assisting the Mackay Company in the work of painting the elevator shaft. The hiring was to include everything, the power, the operator, and the use of the elevator. When the elevators, in pursuance of this agreement, were placed at the disposal of the Mackay Company by the George A. Fuller Company, they were in charge of an operator by the name of Locke. The only control the Mackay Company's men had over the operator was the power to inform him where to take his car—when to go up and when to come down. (Rec., pp. 39 and 43-44.) During the progress of the trial below it was further developed that Locke was at the time of the accident on the pay-rolls of the Otis Elevator Company. It was also shown that Locke was hired by the Otis Elevator Company

to the George A. Fuller Company for three dollars a day. (Rec., pp. 19 and 22.) The George A. Fuller Company then hired the use of the elevators and their operation, which included the motive power and services of an operator, who turned out to be Locke, to the Mackay Company at the rate of one dollar an hour.

The accident happened on August 9, 1907. The painters had then been working on the elevator shaft for about two weeks and had completed their work with the exception of touching up some of the rough places. In performing this latter work they had commenced at the top of the shaft and worked down. They worked from the rim around the top of the cage of the car, calling to the operator when they wished to be lowered or raised. In the progress of their work they gradually worked down, touching up the rough places as they went, until the floor of the car was on a level with the first floor and could descend no further. McCloskey and Renner were on the roof of the elevator. The remaining work consisted in touching up the walls of the shaft between the first and second floors, the space then occupied by the body of the car. To get at this it was necessary to get under the car. To get from the top of the car McCloskey and Renner would have to be taken to the next landing above, which was the second floor landing, a distance of about ten feet. Renner was standing on the front rim of the car facing the hallway; McCloskey was standing on the east rim facing the center of the car. McCloskey then had a paint box and stippling brush in his hands. He requested Locke to take him and Renner up to the second floor and let them off. Locke started the elevator, paused at the second floor, bringing the elevator almost to a stop, then started with a jerk, continuing on, to and above the fifth floor. The sudden start threw McCloskey off his balance and before he could get up he was fast in the weights (Rec., pp. 7 and 13), just above the fifth floor. His right foot was caught between the balancing weights and the top of the elevator, severing the *Tendo Achilles* and fracturing the heel bone, inflicting permanent injuries upon him so that he is unable to follow his occupation of painter and paper hanger. (Rec., pp. 7-8.)

ASSIGNMENTS OF ERROR.

The assignments of error mentioned in the brief filed by the plaintiff in error involve four separate propositions of law, which will be considered in the following order:

First: The question of the sufficiency of the plaintiff's (defendant in error) declaration.

Second: The propriety of the action of the trial Court in refusing peremptorily to instruct the jury in favor of the defendant on the ground that the evidence showed the plaintiff to have been guilty of contributory negligence.

Third: The propriety of the action of the trial Court in declining to submit to the jury the question as to whose servant Locke was at the time of the happening of the accident; and

Fourth: The propriety of the action of the trial Court in ruling as matter of law that the elevator operator, Locke, must for the purposes of this suit be considered by the jury at the time of the accident to have been the servant of the George A. Fuller Company.

ARGUMENT.

The Sufficiency of the Plaintiff's (Defendant in Error) Declaration.

It is claimed by plaintiff in error that the plaintiff's declaration is defective in that "there is no allegation that the plaintiff ever requested any employee of the George A. Fuller Company to do the thing, the omission to do which is charged as the cause of the plaintiff's injury." (Brief of Plaintiff in Error, 42.) In answer to this it is submitted:

First: That the plaintiff's (Defendant in Error) declaration does sufficiently charge negligence on the part of the George A. Fuller Company; and

Second: That even though it does not, such supposed defect has been cured by verdict, or, if it has not, the question cannot be considered by this Court for the reason that it was never raised in the trial court.

1. It will be observed that the declaration after the recitation of some matters of inducement, charges (Rec., p. 2) "that in order that the said Robert E. Mackay Company, its agents and employees, might more conveniently and expeditiously paint the said elevator shaft as aforesaid, the said George A. Fuller Company entered into an agreement with the said Robert E. Mackay Company for hire, *to operate said elevator, so that said company's employees might stand on top of the elevator and that it might be lowered or raised as might be necessary in the painting of said shaft, and to start and stop said elevator whenever and wherever requested by this plaintiff so that he might continue to paint or to alight from said elevator.*" The declaration then charges that the George A. Fuller Company employed the defendant, the Otis Elevator Company, to run and operate the said elevator, and continues (Rec., p. 2) "that it then and there became and was the duty of it, the George A. Fuller Company, to so operate *or cause to be operated said elevator, as the said plaintiff's employer or any of its employees engaged in said painting work might designate, and not to start the said elevator, or if started not to carry said elevator further than might be designated as aforesaid,*" etc. Continuing, the declaration charges the Otis Elevator Company with practically the same duty. The plaintiff's position on top of the elevator and his request to the operator to stop at the second floor is then set out and the breach of duty on the part of *both* defendants is assigned as follows (Rec., p. 3): "But the said defendants (plural), not regarding their said duties in the premises, did so negligently, carelessly and recklessly operate and cause to be operated said elevator, that the same was carried up to the fifth floor, where the said weights and elevator met, as aforesaid, in direct violation of the request of the plaintiff to stop the same at the second floor." That as the result of this negligence on the part of *both defendants* the plaintiff was injured. It is difficult to see how it would have been possible for plaintiff's counsel in framing his declaration more specifically to charge negligence against the George A. Fuller Company. The plaintiff in error in discussing this feature

of the case has selected and set out in his brief a detached extract from the declaration which in itself means nothing, but which when taken in connection with the rest of the text of the declaration, it is believed, sufficiently charges negligence on the part of the George A. Fuller Company.

2. Should it be the view of this Court, however, that the declaration is defective in the respect claimed for by counsel, it is submitted that the plaintiff in error cannot take advantage of such defect in the present state of the record. It is a matter of elementary law that defects of this character should be taken advantage of either by a demurrer to the declaration before trial, or by a motion in arrest of judgment after a verdict. Neither of these objections was made by the plaintiff in error. The point is now raised for the first time by the brief of plaintiff in error. This is too late.

The only other method by which the supposed defect might possibly have been taken advantage of, is in a claim of variance. If the position of the plaintiff in error is unsound upon the other supposed errors claimed to have been made by the trial court, the situation would be presented of a defective declaration with sufficient proof offered upon it at the trial to make out a good case against the defendant. In such a situation, as has been said, it might be claimed that the proof offered at the trial did not correspond with the allegations of the declaration, hence there was a variance. It is submitted upon this point that should such be the case, plaintiff in error, by not raising the point in the court below, is precluded from insisting upon it here. The claim of variance is made either, first, by objection to the evidence when offered on the ground that the foundation for it has not been laid in the declaration (Sheely vs. Mandville, 7th Cranch, U. S., 208; U. S. vs. Denicke, 35 Fed. Rep., 407); second, by motion to strike out testimony already offered upon the same ground (22 Enc. Pl. and Pr., 633); third, by motion to strike out *all* the testimony offered on behalf of the plaintiff and direct a verdict for the defendant on the ground that the testimony offered does not support the

averments of the declaration. As no objection was made to the introduction of testimony in the present case on the grounds mentioned, and as no motion was made by the plaintiff in error at any time during the progress of the trial in the lower Court to strike out evidence already offered for that reason, the only question remaining for consideration upon this point is whether or *not* the motion made at the conclusion of all the testimony to direct a verdict for the defendant can be considered by this Court sufficient to raise the question of variance. It is submitted that it cannot be so considered. That motion is as follows (Rec., p. 56): "The jury are instructed that under the pleadings and all the evidence, their verdict should be for the defendant, the George A. Fuller Company." That motion was argued in the trial Court upon the ground that the plaintiff had shown himself by his own testimony to have been guilty of contributory negligence, and second, that from all the evidence in the case the elevator operator, Locke, could not be considered to have been the servant of the George A. Fuller Company. No suggestion was ever made of any supposed defect in the declaration, or that the proof offered at the trial was variant from its allegations. The wording of the motion in no way implies that such an objection was ever in the mind of counsel. In Gerding vs. Haskin, 141 N. Y., 514, it is said, "the motion for the direction of a verdict must set out specifically the grounds on which it is based so that the adverse party may supply the defect if he can, but the grounds may not be specified if it is obvious the defect could not have been obviated had it been pointed out." If the supposed defect in the declaration had been pointed out by the defendant in the trial court and that court was of the opinion that such defect existed, the plaintiff could have very readily taken leave to amend his declaration at the trial table and thus remedied all objection.

It has been frequently held in appellate practice in the Federal Courts, that it is the duty of a plaintiff in error, affirmatively to show that error has been committed by the trial court, and that it is not to be presumed and will not

be inferred from a doubtful statement in the record (Van Stone vs. Stilwell & B. Manufacturing Co., 142 U. S., 128; The Grand Trunk Railway Co. of Canada vs. Albert Ives, 144 U. S., 408; Mercantile Trust Company vs. Hensey, 205 U. S., 298). In the latter case, which was an appeal from a judgment of the Supreme Court of the District of Columbia, an action had been brought by Hensey, the owner of certain buildings then recently constructed, against the Mercantile Trust Company, as surety upon a bond given by his contractor who had undertaken the construction of the houses. Hensey claimed that the contractor had not performed his contract in that he had, first, permitted defective materials to be used in the buildings; second, that he had permitted structural defects in the construction of the buildings, and third, that he had omitted certain details called for in the specifications. At the trial of the case a number of witnesses testified that by reason of all three breaches the houses were lessened in value to the extent of about $2,000. The court ruled in submitting the case to the jury that they were only entitled to consider the question of omissions with reference to the depreciation of the value of the houses, and should not take into account structural defects or defective material. A general prayer was made by the defendant to take the case from the jury, but the ground upon which the prayer was made was not stated in the prayer itself, nor did the record show upon what ground the instruction was asked. It was urged on appeal that as the record showed that the testimony of the witnesses had reference to the decreased value of the houses as the result of omissions, structural defects and defective materials, unsegregated, and as the court had instructed them that they could only consider omissions alone, that there was no basis upon which they could estimate the damage to the property. And further, as the plaintiff had moved the court to direct the jury to return a verdict in its favor, that the trial court was in error in submitting the case to the jury. In disposing of this point the Supreme Court uses the following language:

"It is part of the duty of a plaintiff in error, affirmatively to show that error was committed. It is not to be presumed, and will not be inferred from a doubtful statement in the record. We think in this case the record fails to show the absence of the evidence as argued by the plaintiff in error. If, however, we assume that there was no such evidence in detail and only a conclusion given as to the total amount of damage, and if we further assume that the twelfth request of the plaintiff in error was charged by the court, and the right of recovery was thereby limited as stated, *it does not appear that the plaintiff in error made any point on the trial of the absence of the evidence of damage in detail, or that the court was asked to direct a verdict for the defendant on account of its absence.* If there were no evidence of the amount of damage caused by each particular breach, but only of the total amount sustained, and the plaintiff in error desired to avail itself of that objection to a recovery for the particular damage permitted, counsel should have called the attention of the court to the point, and requested a direction of a verdict for the defendant *on that ground.* No such request was made, and nothing was said which would show that counsel for the plaintiff in error had any such objection in mind, and he cannot argue an objection here which was never taken in the trial court." Mercantile Trust Company vs. Hensey, 205 U. S., 298.

In Roberts vs. Graham, 6 Wallace, 578, the Untied States Supreme Court, in dealing with the subject of variance, says: "The objection of variance, not taken at the trial, cannot avail the defendant as an error in the higher court if it could have been obviated in the court below; nor can it avail him on the motion for a new trial. Mosher vs. Lawrence, 4 Denio, 421; Lawrence vs. Barker, 5 Wend., 305. In McMicken vs. Brown, 6th Mart. (N. S.), 86, the defendant made no objection to the introduction of the testimony, but prayed the court to instruct the jury that it was insufficient to warrant a verdict against him. The jury found for the plaintiff. It was held by the Appellate Court that he should have objected to the omission of the evidence and that, not having done so, he was concluded by the ver-

dict. The judgment was affirmed. See also Goslin vs. Corry, 7 Man. and G., 347, and Doe vs. Benjamin, 9 A. D. and E., 644. In the case before us the plaintiff was entitled to be apprised of the objection if it were intended to be relied upon, at an early period in the progress of the trial. The court would doubtless have permitted an amendment if deemed necessary, upon such terms as the interest of justice might seem to require. The defendant's right to make the objection was waived and concluded by the delay. He could not make it at the time and in the manner it was presented. " See also Westville Coal Company vs. Schmitz, 177 Ill., 278, and Chicago & West Mich. Ry. Co. vs. Hull, 76 Ill. Appl., 408.
(Rec., 6. 56):

THE QUESTION OF CONTRIBUTORY NEGLIGENCE.

1. The second proposition of law advanced by the plaintiff in error deals with the question of the plaintiff's alleged contributory negligence. The defendant, by its third prayer, requested that the jury be instructed as follows (Rec., p. 56):

> "If the jury find from all the evidence that the accident to the plaintiff was occasioned wholly or in part by reason of the fact that he had placed himself in an exposed and dangerous position on top of the elevator car when he might have readily placed himself in a safe and secure position, the verdict should be for the defendant, the George A. Fuller Company, regardless of any supposed negligence on the part of the operator and regardless of whether the operator was a servant of the George A. Fuller Company or not."

This prayer was amended by the Court by inserting the following language:

> "With reference to [the elevator operator] obeying the signals to stop at the second floor, if you find such signals were given."

The words "elevator operator" do not appear in the prayer as it is copied into the record, but it can readily be seen by the court that the amendment is meaningless

without them. The omission was probably an error in transcribing it from the record. In any event, this instruction was made entirely clear by the oral instruction of the learned Trial Justice (pp. 60-61).

That amendment was insisted upon by counsel for the plaintiff and granted by the trial court for the following reason. It can readily be seen that the question of the safety of the position occupied by the plaintiff on the top of the elevator car would be altogether different, had he intended to go up beyond the fifth floor, than it would be had he intended to go to the second floor only. If the plaintiff had intended to and informed the elevator operator that he wished to be carried to the fifth floor or beyond, his position, had be been standing where the weights passed the car at the fifth floor, would have been obviously a dangerous one. But the plaintiff did not wish to go beyond the second floor, and he specifically instructed the operator to elevate the car so that he could get off at the second floor. He had the right to assume that the operator would obey his instructions, and if the operator had obeyed his instructions to stop at the second floor, the plaintiff would at no time have been in danger of coming in contact with the descending weights. It was only, therefore, because the operator did not obey the plaintiff's instructons and shot the elevator up beyond the fifth floor, that the plaintiff's position became a dangerous one To have left the instruction in the form in which it was presented by the defendant, would, therefore, it is submitted, have been confusing and unwarranted by the facts in the case. The qualification, "with reference to the elevator operator obeying the signals to stop at the second floor, if you find such signals were given," qualifies the instruction so as to make it meet the requirements of the present case.

2. Plaintiff in error further insists that the Court should have held that the plaintiff (defendant in error) was guilty as matter of law, of contributory negligence, and that a verdict should have therefore been directed in its favor. Upon a motion of this character, which is equivalent to a demurrer to the evidence, the testimony of the plaintiff

and his witnesses as to the manner in which the accident occurred must be considered as true. It is submitted without comment that the testimony of McCloskey and Renner makes out a *prima facie* case of negligence on the part of the elevator operator, Locke. If the plaintiff had instructed the elevator operator to carry the car to some point beyond the fifth floor of the building so that the weights would have passed the car before it reached its destination, then there might be some ground for the argument that the plaintiff, in occupying the position he did on the rim around the top of the cage, had assumed an unsafe position by reason of being in a position where he might have been thrown in the path of the descending weights. But the testimony of the plaintiff and of the witness Renner, is that the operator was instructed by the plaintiff to stop at the second floor. If this instruction had been obeyed, then there could have been do danger of contact with the descending weights. Hence the position of the plaintiff on the top of the car, had the operator done as he was directed to do, was a perfectly safe one. The negligence charged by the plaintiff is the failure of the operator to obey this instruction.

Upon the subject of a trial court directing a verdict for the defendant upon the ground of the plaintiff's contributory negligence this court has said:

> "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the question is matter for the jury. It is only where the facts are such that reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court." Texas & P. Railway Co. vs. Gentry, 163 U. S., 353, 366.

Question As to Whose Servant Locke Was, One for the Court and Not for the Jury.

Counsel for plaintiff in error in discussing the fourth proposition of law advanced in his brief, insists, "assuming that there was any evidence tending to show that Locke was the servant of the George A. Fuller Company, the question should have been submitted to the jury to decide under all

the evidence under proper instruction." In other words, it is claimed on behalf of plaintiff in error that the trial court instead of ruling as a matter of law that Locke was the servant of the Fuller Company should have left that question to the jury to decide as an issue of fact. It is believed that it is well settled that in a *nisi prius* court that issues of law are disposed of by the court and issues of fact alone are submitted to the jury. If there were any conflict in the testimony in the present case in regard to the facts relating to the employment of Locke, the position taken by plaintiff in error would be a correct one; but such is not the case. The testimony upon this subject is in accord. This is conceded by counsel for plaintiff in error. At page 30 of his brief he says, "we agree with the court below that there was no conflict in the evidence upon the facts relating to Locke's employment." If there were no issue of fact to submit to the jury upon this point it is respectfully submitted that it would have been grossly improper in the trial court to have left the question of the law applicable to admitted facts to the conjecture or guess of the jury. What the court did and what it is believed was the proper and only action the court could take upon the question of Locke's employment, was, after it having been conceded by counsel for the defendant that there was no conflict in the testimony to rule as matter of law applicable to the evidence whose servant Locke was. The court ruled that Locke was the servant of the defendant, the George A. Fuller Company. Whether or not that ruling was justified by the undisputed facts will be considered in the next branch of the argument. There certainly can be no question, however, that the court was correct in deciding the point of law instead of leaving it to the jury.

THE PROPRIETY OF THE RULING OF THE TRIAL COURT IN HOLDING AS MATTER OF LAW UPON ADMITTED FACTS THAT LOCKE WAS THE SERVANT OF THE GEORGE A. FULLER COMPANY.

It is considered by counsel unnecessary to enter into a detailed review of the mass of testimony offered at the

trial relating to the various services in which the elevator operator Locke had been engaged prior to the time of the hiring of the use of the elevators—their operation—by the Fuller Company to the Mackay Company. It is believed that it is sufficient in this connection merely to call to the attention of the court the following facts: Shortly before the Mackay Company was ready to paint the elevator shaft Mr. Minte, its representative, called upon Mr. Baird, the local superintendent of the Fuller Company, and engaged from said company the use of the elevators—their operation —for a consideration of one dollar an hour. It will be observed that the Fuller Company did not furnish the elevators, the power and the operator to the Mackay Company, but furnished the work they did to said company for a price, as its own work, by and through it own instrumentalities. When the Fuller Company in the performance of this contract placed the elevators at the disposal of the Mackay Company they were in charge of the operator Locke. Locke continued to operate the elevators during the painting of the elevator shaft, subject to the signals of the employees of the Mackay Company. The question of who primarily and who ultimately paid Locke's wages in view of this specific agreement on the part of the Fuller Company, it is believed, is entirely immaterial to this issue. It is also believed that the question as to whether Locke was carried on the pay-rolls of the Otis Elevator Company or the pay-rolls of the Fuller Company is equally immaterial. The Fuller Company contracted with the Mackay Company to supply the latter with the use and operation of the elevators through its own instrumentalities as its own work and under its contract it was its duty to do so. The operator in charge of the elevators which it did supply was the man for whose negligence the appellee now seeks to hold the Fuller Company.

The contract between the Fuller Company and the Mackay Company was to the advantage of the former; it had entered into a contract with W. B. Hibbs to complete the building within ten months; the time had expired. It was to receive eight (8%) per cent. above the actual cost

for its superintendence. The sooner the building was completed, the greater its profits.

The facts in this case as far as the proposition of law now contended for is concerned, are practically identical with the facts in the case of Standard Oil Company vs. Anderson, 212 U. S., 215, where the negligent servant was held to be in the employ of the defendant (petitioner).

In this case, Anderson, the respondent, was employed as a longshoreman by one Torrence, a master stevedore, who under contract with the defendant, was engaged in loading the ship Susquehanna with oil. The plaintiff was working in the hold, where, without fault on his part, he was struck and injured by a draft or load of cases containing oil, which was unexpectedly lowered. This ship was along side a dock belonging to the defendant, and the cases of oil were conveyed from the dock to the hatch by hoisting them from the dock to a point over the hatch, whence they were lowered and guided into the hold. The work was done with great rapidity. The motive power was furnished by a steam winch and drum, and the hoisting and lowering were accomplished by means of a tackle, guy rope, and hoisting rope. The tackle and ropes were furnished and rigged by the stevedore, and the winch and drum were owned by the defendant and placed on its dock, some 50 feet distant from the hatch. All the work of loading was done by employees of the stevedore, except the operation of the winch, which was done by a winchman in the general employ of the defendant. The case was tried before a jury and the plaintiff had a verdict.

The Court said:

> "The only question presented is whether the winchman was, at the time the injuries were received, the servant of the defendant or of the stevedore. If he was the servant of the defendant, as he was found to be by the courts below, the defendant was responsible for his negligence."
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> "The decision of this question requires us to consider some further facts which were not disputed. The

winchman was hired and paid by the defendant, who alone had the right to discharge him. The stevedore agreed to pay the defendant $1.50 a thousand for the hoisting. The stevedore had no control over the movements and conduct of the winchman, except as follows: The hours of labor of the winchman necessarily conformed to the hours of labor of the longshoremen. The winch and winchman were at a place where it was impossible to determine the proper time for hoisting and lowering the draft of cases of oil, and the winchman necessarily depended upon signals from others. The signals were given by an employee of the stevedore, called a gangman, who stood upon the deck of the ship and gave signals to hoist or lower by the blowing of a whistle which could be heard for a long distance. The negligence consisted in lowering a draft of cases before receiving this signal." * * * *

"It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished. But on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are, for the time, his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still, in its doing, his own work. To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to

details or the necessary co-operation, where the work furnished is part of a larger undertaking." * * * *

"In many of the cases the power of substitution or discharge, the payment of wages, and other circumstances bearing upon the relation are dwelt upon. They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control.

"Let the facts in evidence now be considered in the light of the foregoing principles of law. Was the winchman, at the time he negligently failed to observe the signals, engaged in the work of the master stevedore, under his rightful control, or was he rather engaged in the work of the defendant, under its rightful control? We think that the latter was the true situation. The winchman was, undoubtedly, in the general employ of the defendant, who selected him, paid his wages, and had the right to discharge him for incompetency, misconduct, or any other reason. In order to relieve the defendant from the results of the legal relation of master and servant it must appear that that relation, for the time, had been suspended, and a new like relation between the winchman and the stevedore had been created. The evidence in this case does not warrant the conclusion that this changed relation had come into existence. For reasons satisfactory to it the defendant preferred to do the work of hoisting itself, and received an agreed compensation for it. The power, the winch, the drum, and the winchman were its own. It did not furnish them, but furnished the work they did to the stevedore. That work was done by the defendant, for a price, as its own work, by and through its own instrumentalities and servant, under its own control.

"Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be co-operation and co-ordination, or there will be chaos. The giving of the signals under the circumstances of this case was not the giving of orders, but of information; and the obedience to those signals showed co-operation rather than subordination, and is not enough to show that there has been a change of masters."

Citing with approval Driscoll vs. Towle, 181 Mass., 416. Opinion by Holmes, C. J. (now Mr. Justice Holmes).

"* * * We think that the courts below correctly held that the winchman remained the servant of the defendant. * * *

"Judgment affirmed."

It is not thought necessary to discuss any of the cases cited by this court in this case, or to cite further cases to maintain the contentions of the defendant in error in this behalf.

Locke at the time of the accident was willingly engaged in doing the work of the plaintiff in error with its consent and whether he was employed by it or at all to do so is immaterial. He is in law as to the defendant in error, who was injured through his negligence to be considered the servant of the plaintiff in error.

Cooley on Torts (3d Ed.), pp. 1006-9;
Union Ry. and Transit Co. vs. Kallaher, 114 Ill. Supreme Court, 325;
Pa. Ry. Co. vs. Roy, 102 U. S., 451.
Oil Creek, etc., R. Co. vs. Keighron, 74 Pa. St., 316.

Although the Otis Elevator Company in the first instance paid Locke's wages the fact that it was afterwards reimbursed by the Fuller Company is tantamount to the Fuller Company paying him in the first instance.

Mo. Pacific Ry. Co. vs. Jones, 75 Texas, 151.

For the reasons urged it is respectfully submitted that there is no error in the record and that the judgment of the Court of Appeals should be affirmed.

S. V. HAYDEN,
HAYDEN JOHNSON,
Attorneys for Defendant in Error.

GEORGE A. FULLER COMPANY *v.* McCLOSKEY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 176. Submitted March 7, 1913.—Decided April 7, 1913.

The averments in the declaration when taken together, *held* sufficient to allow proof of negligence on the part of one defendant, although one specific charge related exclusively to the other defendant as to whom the case was dismissed.

A modification of the requested charge so as to make it conform to the facts of the case, *held* in this case not to have been error, the jury having been properly instructed by the court on the subject of contributory negligence.

A variance between proof and declaration should be called to the

attention of the trial court when the declaration can be met by an immediate amendment.

A contractor erecting a building arranged with another and independent contractor who was putting in the elevator to use and control the elevator and an operator therefor before it was turned over to the owner; he also arranged to allow his own subcontractor painting the elevator shaft to use the elevator and to signal when and where the elevator was to stop to let the employés off and take them on. *Held* that the contractor was the sole master and was responsible for damages sustained by an employé of the subcontractor resulting from negligence of the operator in failing to respond to signals properly given by such employé.

35 App. D. C. 595, affirmed.

THE facts, which involve the liability of a contractor for personal injuries caused by negligence in operating an elevator, are stated in the opinion.

Mr. Edward S. Duvall, Jr., for plaintiff in error:

It was error in the trial court to decide, as matter of law, under the evidence, that the elevator boy was the servant of the Fuller Company. *Standard Oil Co.* v. *Anderson*, 212 U. S. 215; *Byrne* v. *Kansas City R. R. Co.*, 61 Fed. Rep. 609; *Powell* v. *Construction Co.*, 88 Tennessee, 692; *The Elton*, 142 Fed. Rep. 367; *Rourke* v. *White Moss Colliery Co.*, L. R. 2; C. P. D. 205; *Murrie* v. *Currie*, L. R. 6; C. P. 24; *Donovan* v. *Construction Syndicate*, 1 Q. B. (1893) 629; *Wylie* v. *Palmer*, 137 N. Y. 248; *McInerney* v. *Delaware & Hudson C. Co.*, 151 N. Y. 411; *Delory* v. *Blodgett*, 185 Massachusetts, 126; *D., L. & W. R. Co.* v. *Hardy*, 59 N. J. L. 35; *Parkhurst* v. *Swift*, 31 Ind. App. 521; *Anderson* v. *Boyer*, 156 N. Y. 93; *Connor* v. *Koch*, 63 App. Div. (Sup. Ct. N. Y.) 257. See also *Ches. & O. Ry. Co.* v. *Howard*, 178 U. S. 153; *Guy* v. *Donald*, 203 U. S. 399.

There is no sufficient allegation of negligence against the Fuller Company in the declaration, nor is there any evidence sufficient to support a verdict against that company.

It is an important test of liability whether the company reserve the power not only to direct what shall be done, but how it shall be done. *Railroad Co.* v. *Hanning*, 15 Wall. 649; *Singer Mfg. Co.* v. *Rahn*, 132 U. S. 518; *Casement* v. *Brown*, 148 U. S. 622; *B. & O. R. R. Co.* v. *Baugh*, 149 U. S. 368. See also *Morgan* v. *Smith*, 159 Massachusetts, 570; *Geer* v. *Darrow*, 61 Connecticut, 220; *Charlock* v. *Freel*, 125 N. Y. 357; *Bailey* v. *Troy & B. R. Co.*, 57 Vermont, 252; *Johnston* v. *Ott*, 155 Pa. St. 17.

If an independent contractor is employed to do a lawful act, and in the course of the work his servants commit some casual act of wrong or negligence, the employer is not answerable. 2 Kent Com., p. 260; *Reedie* v. *London & N. W. R. Co.*, 4 Exch. 244, 256; *Overton* v. *Freeman*, 11 C. B. 867; *Gayford* v. *Nichols*, 9 Exch. 702, 707; *Peachy* v. *Rowland*, 13 C. B. 182; *Forsyth* v. *Hooper*, 11 Allen, 419; *Hilliard* v. *Richardson*, 3 Gray, 349; *Blake* v. *Ferris*, 1 Seld. 48; *Pack* v. *New York*, 8 N. Y. 222; *De Forrest* v. *Wright*, 5 Michigan, 368; *Painter* v. *Pittsburgh*, 46 Pa. St. 213; *Eaton* v. *European & N. A. R. Co.*, 59 Maine, 520; *McCarthy* v. *Second Parrish*, 71 Maine, 318; *Cunningham* v. *International R. R. Co.*, 51 Texas, 503; *King* v. *N. Y. Cent. R. Co.*, 66 N. Y. 181. See also *Schnurr* v. *Board of Com'rs of Huntington Co.*, 22 Ind. App. 188; *Sullivan* v. *New Bedford Gas & Edison Light Co.*, 190 Massachusetts, 288; *Hooe* v. *Boston & N. St. Ry. Co.*, 187 Massachusetts, 67; *Laugher* v. *Pointer*, 5 B. & C. 560; *Clark* v. *Hannibal &c. R. Co.*, 36 Missouri, 202; *Houser* v. *Metropolitan Railroad Co.* 27 Misc. (N. Y.) 538; *Blake* v. *Ferris*, 5 N. Y. 48; *S. C.*, 55 Am. Dec. 304.

The relation between parties which renders one liable to third persons for the acts of negligence of the other must be that of superior and subordinate, and is based on the control which the superior has the right to exercise over the acts of the subordinate in the performance of his duties, and an employer is not so liable for the acts of an

independent contractor, who is never subject to such control, nor is he liable for the acts of the employés and servants of such independent contractor. *Casement* v. *Brown, supra; Robbins* v. *Chicago*, 2 Black, 418, and 4 Wall. 657; *Hill* v. *Schneider* (N. Y., 1897), 13 App. Div. 299; *Uppington* v. *City of New York*, 165 N. Y. 222; *Boomer* v. *Wilbur*, 176 Massachusetts, 482; *Francis* v. *Johnson*, 127 Iowa, 391.

The burden of proof was on the plaintiff to show that the defendant entered into the contract with the Mackay Company to operate the elevator so that the Mackay Company's employés might stand on top of the elevator, etc. *Pa. R. R. Co.* v. *Jones*, 155 U. S. 333; *Tyler* v. *Pa. R. R. Co.*, 18 App. D. C. 31.

It was McCloskey's duty while on the elevator to exercise proper care for his own safety, and the court erred in refusing to grant the defendant's third prayer in that behalf. *Railroad Company* v. *Jones*, 95 U. S. 443.

Assuming that there was any evidence tending to show that Locke was the servant of the Fuller Company, the question should have been submitted to the jury to decide under all the evidence under proper instruction. *Driscoll* v. *Towle*, 181 Massachusetts, 416; *D., L. & W. R. Co.* v. *Hardy*, 59 N. J. L. 35; *Daley* v. *Boston & Albany R. Co.*, 147 Massachusetts, 101; *Connor* v. *Koch*, 63 App. Div. (Sup. Ct. N. Y.) 257.

Mr. S. V. Hayden and *Mr. Hayden Johnson* for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

This action was brought by Wilson A. McCloskey, the defendant in error, to recover damages for personal injuries caused by alleged negligence in the operation of an

elevator in the Hibbs Building in this District. At the time of the accident McCloskey, who will be called the plaintiff, was engaged in painting the elevator shaft and for this purpose was riding on top of the elevator. The action was brought against the Otis Elevator Company, and the plaintiff in error, George A. Fuller Company. Without objection, a verdict was directed in favor of the Otis Elevator Company, but the case against the George A. Fuller Company was submitted to the jury who found a verdict in favor of the plaintiff. The judgment on this verdict was affirmed by the Court of Appeals of the District and the case comes here on writ of error. 35 App. D. C. 595.

The facts appearing upon the trial are succinctly stated in the opinion of the court below, in which the George A. Fuller Company is described as the defendant, as follows:

"The defendant company contracted with William B. Hibbs to erect for him an office building on 15th Street is this city. The work was to be completed by a time certain. This contract did not include the installation of an elevator. That work was provided for in a contract between Hibbs and the Otis Elevator Company. The elevator company installed its elevator long before the completion of the building. This elevator, down to the time of the injury to the plaintiff, had not been turned over to the owner of the building, but was operated by an employé of the Otis Company, who was paid and generally controlled by that company. After its installation the defendant company entered into an arrangement with the elevator company by which it became entitled to use this elevator in the prosecution of its work, paying to the elevator company three dollars per day, which was to cover the wages of the caretaker or operator aforesaid, the Otis Company reserving the primary right to use the elevator. Under this arrangement the defendant

company was to have no control over the elevator operator other than to notify him when to start and when to stop his machine.

"The defendant company entered into a subcontract with the Robert E. Mackay Company of New York for the painting required by its contract with Mr. Hibbs. The plaintiff was an employé of the Mackay Company. The elevator shaft was included in this subcontract. To paint this it was of course necessary that some means be provided whereby workmen could ascend and descend the shaft. Therefore the Mackay Company entered into an agreement with the defendant company by which the defendant company agreed to furnish the Mackay Company, for use in painting said shaft elevator, power and operator at any time that the elevator company or the defendant company did not want them. Nothing whatever was said about the arrangement between the elevator company and the defendant company, the agreement between the Mackay and the defendant company proceeding upon the theory that the equipment and elevator were under the control of the defendant company. The Mackay Company was not to have, and in fact did not have, any control over the operator other than to direct him when to start and when to stop his elevator while thus temporarily used as a movable staging.

"Upon the day of the accident plaintiff and another workman were on the roof of the elevator touching up the walls of the shaft. They had worked down until the floor of the car was on a level with the first floor of the building. To finish the walls of the shaft between the first and second floors of the building, the space then occupied by the body of the car, it became necessary to get under the car. To do this it was necessary for the painters to be taken to the next or second floor landing. The plaintiff was standing on the rim or ledge around the top of the car and facing the centre of the car. He had

a paint box and brush in his hands. The other painter was on another side of the top with his back to the plaintiff. This rim or ledge was about six and one-half inches wide. Plaintiff called to the elevator operator to take him and the other painter up to the second floor and let them off there. There was evidence before the jury that when the car had reached a point where plaintiff had directed that it be stopped, the car paused and suddenly started again, throwing plaintiff off his balance, which he was unable to regain until the car has reached the fifth floor, where he was caught in the weights which passed the car at that point."

The contention based upon the asserted insufficiency of the declaration is without merit. So far as appears the evidence was received without any objection upon this ground, and the assignment of error rests solely upon the refusal of the trial court to grant a general prayer that the court should instruct the jury that "under the pleadings and all the evidence" their verdict should be for the Fuller Company. It is urged that there is no sufficient averment of the negligence of this company and attention is directed to the allegation of the declaration that the plaintiff "requested the said defendant, Otis Elevator Company, its servants and employés to stop said elevator at the second floor, so that he might get off and alight therefrom." It is manifest, however, from the other allegations of the declaration that the plaintiff intended to charge, and did charge, negligence on the part of both defendants. The attention of the trial court was not called to any particular in which the declaration was deemed to be insufficient as against the Fuller Company and no mention was made of the specific point now raised. If this point had been suggested it is apparent that, in view of the allegations contained in the declaration, such variance as there was between pleading and proof could properly have been met by an immediate amendment and the case could

then have been submitted to the jury precisely as it was submitted.

It is also assigned as error that the trial court improperly modified one of the requests of the Fuller Company for instruction upon the subject of contributory negligence. The requested instruction with the modification made by the trial court, which appears in the words italicized, was as follows: "If the Jury find from all the evidence that the accident to the plaintiff was occasioned wholly or in part by reason of the fact that he had placed himself in an exposed and dangerous position on *the ledge around* the top of the elevator car, *with reference to obeying the signals to stop at the second floor, if you find such signals were given* when he might readily have placed himself in a safe and secure position, the verdict should be for the defendant the George A. Fuller Company, regardless of any supposed negligence on the part of the elevator operator and regardless of whether the operator was a servant of the Fuller Company or not." The court undoubtedly added these words because the evidence showed that the plaintiff had asked the operator to stop at the second floor and there was no danger from the weights until the elevator reached the fifth floor. The fact that the plaintiff intended to go only to the second floor and had signaled accordingly was properly to be taken into consideration in passing upon the question whether in the circumstances he acted with reasonable prudence. The court in other portions of the charge correctly instructed the jury on the subject of contributory negligence and there is not the slightest ground for the conclusion that there was any doubt as to the meaning of the court in the words used in modifying the defendant's request, or that any prejudicial error was committed.

The principal argument for reversal is based on the ruling of the trial court that Locke, the operator of the elevator, was the servant of the Fuller Company. The

court below approved this ruling and we find no error in its conclusion. So far as Locke's employment was concerned, there was no dispute as to any matter of fact and the question of the liability of the Fuller Company for his negligence, if he was negligent in the operation of the elevator, was one of law. It cannot be said that, under the arrangement between the Fuller Company and the Mackay Company, Locke was transferred to the employment of the latter. The Fuller Company had contracted for the construction of the building. It had made a subcontract with the Mackay Company which covered the painting of the elevator shaft. It was convenient in doing this that the top of the elevator should be used as a movable platform. But the Fuller Company needed the elevator from time to time for other purposes; and it was important to it that the elevator shaft should be kept free of obstructions and that the elevator should continue to be at its command. Accordingly, the Fuller Company agreed to furnish to the Mackay Company the use of the elevator and the service of the operator, for a specified sum per hour, when the elevator was not otherwise required. The Fuller Company was thus aiding in the prosecution of the work which it had contracted with the owner of the building to perform, and in providing the use of a facility to a subcontractor it secured the doing of the work at the smallest inconvenience to itself. It must be concluded that the operating of the elevator under this arrangement with the Mackay Company was an operating of it by the Fuller Company. It is true that the employés of the Mackay Company were to give the signals for starting and stopping the elevator, but this did not make the operator who received them, the servant of the Mackay Company. These signals simply notified him as to what was required from time to time in the course of the service which the Fuller Company had agreed to provide.

The court below followed the decision of this court in the case of *Standard Oil Co.* v. *Anderson*, 212 U. S. 215. There the plaintiff was employed as a longshoreman by a master stevedore, who was acting under a contract with the defendant, the Standard Oil Company, in loading a ship with oil. The plaintiff was working in the hold where, without fault on his part, he was struck by a load of cases containing oil which was unexpectedly lowered. The ship was alongside a dock belonging to the defendant, and the cases of oil were conveyed from the dock to the hatch by means of tackle, guy ropes and hoisting ropes furnished and rigged by the stevedore. The motive power was supplied by a winch and drum owned by the defendant and placed on its dock. The work of loading was done by employés of the stevedore except that the winch was operated by a winchman in the general employ and pay of the defendant. The stevedore paid the defendant an agreed sum for the hoisting. The winch was placed where it was impossible to determine the proper time for hoisting and lowering the cases of oil, and the winchman necessarily depended upon signals from an employé of the stevedore stationed on the deck of the ship. The negligence consisted in lowering a draft of cases before the signal was received. The court held that the winchman remained the servant of the defendant and affirmed a judgment recovered against the defendant for his negligence. With respect to the argument based on the fact that the winch was to be operated for the stevedore, according to the orders of his employés, Mr. Justice Moody, in delivering the opinion of the court, said: "Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be coöperation and coördination, or there will be chaos.

The giving of the signals under the circumstances of this case was not the giving of orders, but of information, and the obedience to those signals showed coöperation rather than subordination, and is not enough to show that there has been a change of masters" (*id.*, p. 226).

In the present case, the Fuller Company obtained the use of the elevator, and the operator, from the Otis Company, and paid therefor. But the Otis Company had nothing to do with the arrangement with the Mackay Company. To this transaction, and to the employing of the top of the elevator as a movable platform for the painters, the Otis Company was a stranger. The Fuller Company, having obtained the use of the elevator, agreed to supply it to the Mackay Company and undertook to furnish that company the necessary service in operating it; it asserted control for this purpose, and assumed the duty of operating with proper care.

Judgment affirmed.